No. 10340

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

PACIFIC FRUIT & PRODUCE COMPANY, A CORPORATION, APPELLEE

PETITION OF THE UNITED STATES FOR A REHEARING

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PACIFIC FRUIT & PRODUCE COMPANY, A CORPORATION, APPELLEE

PETITION OF THE UNITED STATES FOR A REHEARING

To the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the United States of America, the appellant in the above-entitled cause, and presents this, its petition, for a rehearing of the above-entitled cause, and in support thereof respectfully shows:

I

On October 18, 1943, this Court rendered an opinion affirming a judgment of the District Court of the United States for the Eastern District of Washington, Northern Division, which had been rendered on July 6, 1942. The District Court, at the close of plaintiff's case at trial, and on motion of the defendant, had entered a judgment dismissing with prejudice an action for an accounting brought by the United States of America against Pacific Fruit & Produce Company.

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The case had been treated as one for conversion by the trial court, which found that the defendant had converted 298 boxes of apples on which the United States held a mortgage, subject to a limited lien in favor of defendant. The record also showed by uncontroverted testimony that 153 boxes of such apples had been sold by defendant for more than 60¢, the amount of its lien, the difference between the sales price and 60¢ representing the damage to plaintiff from the wrongful conversion, amounting in all to $23.45 on the test cause of action alone.

It is respectfully submitted that in view of the record and the findings in the lower court, the dismissal with prejudice was clearly erroneous. Besides denying the United States a recovery to which it was clearly entitled as to 153 boxes of apples, and denying it the right to proceed to prove similar damages in nineteen other causes of action awaiting disposition of the test cause, the judgment deprives the Government of a right to costs as the prevailing party. Consequently, the dismissal was prejudicial to substantial rights of the Government.

Moreover, the result of the decision is a windfall to the Company from its own tortious act—already so adjudged—in appropriating, with knowledge of the Government's lien, the fruit crops of the twenty growers here involved without accounting to the growers, to the Government, or to anyone else for the proceeds. That there is such a windfall is to be seen from the proof, in the test cause of action, that the Company actually received more than the amount of its limited lien on 153 boxes of fruit mortgaged

to the United States. Even if we assume that counsel will fare no better in the other nineteen causes of action, and that the damages proven in the test cause of action are "typical," there is involved $437. Accordingly, we respectfully request this Court to reconsider its decision affirming the judgment below.

II

We respectfully urge that this Court erred in treating the judgment for dismissal with prejudice as an act within the discretion of the trial court (Opinion pp. 1, 9, 12). The dismissal of an action *with prejudice* on motion of a defendant is an adjudication on the merits (F. R. C. P. 41 (b),[1] and if on the merits, plaintiff is entitled to some relief, however slight, such a dismissal may not properly be granted.

At the close of the Government's case in the trial court, it moved for a dismissal without prejudice and the Company moved for a dismissal with prejudice. The original order entered by the court, permitting plaintiff to withdraw his action without prejudice on condition that it pay defendant $250, might be considered a voluntary dismissal upon condition under Rule 41 (a) (2). But the original order together with its "invalid condition" has been held by this Court to be a "blank piece of paper." The later judgment dismissing the case with prejudice can not therefore be predicated thereon, but must be considered on its own merits. The entry of a judgment dismissing

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[1] *Young* v. *United States*, 111 F. (2d) 823 (C. C. A. 9); *Berk* v. *Mathiason Shipping Co.*, 45 F. Supp. 851 (S. D. N. Y.); *Southwell* v. *Robertson*, 27 F. Supp. 944 (E. D. Pa.).

the case with prejudice in effect denied the Government's motion and granted the defendant's. Since the dismissal with prejudice was made upon motion of the defendant, it was an involuntary dismissal, governed by Rule 41 (b) of the Federal Rules of Civil Procedure. The procedure followed by the trial judge in setting out findings of fact and conclusions of law indicates that he considered it to be so governed (cf. *Young* v. *United States,* 111 F. (2d) 823, 825 (C. C. A. 9)).

The grounds for dismissals on the motion of defendant under Rule 41 (b) are (1) failure of plaintiff to prosecute, (2) failure of plaintiff to comply with the Rules or with any order of the court, or (3) after plaintiff has presented his evidence, his failure to show a right to relief.

In the instant case there had been no failure to prosecute, for the case was brought to trial and evidence was submitted. There had been no failure to comply with the Rules. Nor had there been a failure to comply with any valid order of the court. The only remaining ground upon which defendant could rest his motion is therefore that the evidence adduced by plaintiff had shown no right to relief.

This ground is not available here, since the court below found that defendant had converted 298 boxes of apples on which plaintiff had a mortgage lien, thus entitling plaintiff at the very least to nominal damages and to the costs which the complaint had demanded (Appellant's brief, p. 27, fn. 22). The right to costs is a substantial right, and the failure to award

appellant nominal damages, which automatically carry costs, therefore constituted reversible error (Appellant's brief, pp. 29, 30).

But the record shows more than nominal damages; it shows actual damages. The record contains the uncontroverted testimony of one of the defendant's chief accountants as to the price received by defendant for 277 boxes of apples found to have been converted. Of these, 153 boxes were shown to have been sold for more than the amount of the Company's lien (60¢ per box).[2] Some of these sales were interbranch transfers, and, according to defendant's manager, these were always made at the market price (R. 63). The others were private sales. As to these the rule is that property converted by wrongful sale is presumed to be worth

[2] The following table based on the undisputed and uncontroverted testimony of appellee's accountant (R. 139, 146–156) shows the price at which appellee disposed of 277 of the 298 boxes found by the court to have been converted (R. 227).

No. of boxes	Size	Grade	Variety	Date	Price
30	234	F	Winesap	1-22-38	$0.45.
48	56-150	XF	Delicious	2- 1-38	.82½-brokerage.
26	125-150		½ Winesap; ½ Del.	2-10-38	.75-brokerage.
6	All	XF	Delicious	3- 2-38	.90
46	138-163		Romes	2-10-38	.52.
3		C	Delicious	3- 2-38	.45.
5	130-165	F	Romes	3- 2-38	.50.
7		C	Delicious	3- 5-38	.42½-brokerage.
12	163	XF	Delicious	3- 5-38	.70
8	Medium	F	Delicious	3-12-38	.55
2	88-96	F	Winesap	3-10-38	.65
4	163	XF	Winesap	3-24-38	.70-brokerage.
11	163 & smaller	XF	Delicious	4-13-38	.75
25	216	F	Delicious	4-20-38	.60-brokerage.
30		XF	Romes	3- 3-38	.65
14	143 & larger	XF	Delicious	2-26-38	1.00-brokerage.

Brokerage, it was testified, averages $.038 per box (R. 153).

the price received for it. (*Keiley* v. *Mechanics & Traders' Bank,* 72 Hun. 168, affirmed, 144 N. Y. 702; *McVeety* v. *Hayes,* 111 Wash. 457; *Junkin* v. *Anderson,* 12 Wash. (2d) 58.)

In light of this testimony, the finding below that no evidence had been submitted as to the value of the apples converted must be disregarded as being in direct conflict with the record (*Hooper* v. *First Ex. Nat. Bank of Coeur D'Alene,* 53 F. (2d) 593, 597 (C. C. A. 9)).

In accordance with the subordination agreement, of which the Company concededly had notice (R. 88, 138), the interest of the Government lay in whatever was realized on each box in excess of 60¢. The lower court specifically found that such subordination was limited to 60¢ per box and that the Government had a first lien after the Company had deducted 60¢ per box from the proceeds of each sale (R. 226). On the basis of the undisputed testimony, 153 of the 298 boxes were sold at prices in excess of 60¢ per box, the total of such excess, representing the damage to plaintiff, amounting to $23.45. Plaintiff having shown a cause of action in conversion, and actual damages of at least $23.45 at the time it rested, it was clearly error to give defendant judgment on the merits.

On no ground recognized by the courts was defendant entitled to such judgment. Plaintiff's lack of preparation, of which the trial court was so critical, in no way injured or prejudiced defendant. The fact that the Government did not prove all the damages that it might have against the Company in the court below did not give the latter a right to a de-

cision in its favor. The cases cited by this Court in its opinion as justifying the right to dismiss with prejudice where the plaintiff has been negligent in asserting his rights are not pertinent here; for they all deal with dismissals of action for failure to prosecute, i. e., for failure to bring the case to trial,[3] whereas in the instant case, the action has duly been brought to trial and plaintiff has presented his case. The decision of this Court is in effect a holding that a litigant must at his peril prove the last jot and tittle of his right or lose all.

Rule 41 (b) makes no such requirement of a plaintiff. Defendant may only have plaintiff's case dismissed at the close of his evidence if there has been a complete failure to show any right to relief. The test is meritorious, not discretionary; and since under the most limited view of its evidence, plaintiff has shown a right to relief, the judgment for dismissal is not sustainable. Cf. *Young* v. *United States,* 111 F. (2d) 823 (C. C. A. 9); *Federal Deposit Ins. Co.* v. *Mason,* 115 F. (2d) 548 (C. C. A. 3); *Gary Theatre Co.* v. *Columbia Pictures Corp.,* 120 F. (2d) 891 (C. C. A. 7).

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[3] *Hicks* v. *Bekins Moving & Storage Co.*, 115 F. (2d) 406 (C. C. A. 9) (pleadings alone completed; case called without result sixteen times in twenty months); *Refior* v. *Lansing Drop Forge Co.*, 124 F. (2d) 440 (C. C. A. 6) (case pending six years); *Sweeney* v. *Anderson*, 129 F. (2d) 756 (C. C. A. 10) (plaintiff failed to appear at trial); *Congdon* v. *Aumiller*, 79 Wash. 616 (case pending eight years); *Kubli* v. *Hawkett*, 89 Cal. 638 (case pending five years); *Inderbitzen* v. *Lane Hospital*, 17 Cal. App. 2d 103, 106 (case not brought to trial until four years after initial filing).

III

The result of this erroneous judgment is to permit appellee to keep the fruits of its tortious acts in contravention of the rights of the growers and the Government. Appellee has taken as its own the apple crops of twenty separate growers, upon which it knew the Government had a lien, retaining all the proceeds from the sale of such crops, accounting to no one. Not only were the growers left in debt to the Pacific Fruit & Produce Company but their chattels were placed in danger of levy as the last remaining security for the loans made them by the Government. The Government received nothing. The judgment thus enriches defendant at the expense of the taxpayers and tends to discourage future loans of this nature by the Government.

Judge Schwellenbach pointed out the strong equities in favor of the Government (R. 191):

> However, there is in this case a matter of general policy which I think I should take into consideration in passing on this motion. Here we have a case involving the assistance the Government rendered to the Wenatchee Valley in allowing the initial financing during the year 1937. I may be overly sensitive to the obligations of those who do business in the Wenatchee Valley, fruit men, including this defendant, should recognize toward the Government for the assistance that has been rendered to them during the last ten years. Nobody would be in business in the Wenatchee Valley and the Pacific Fruit and Produce Company would not be in business in the Wenatchee Valley were it not

for the fact the initial financing has been furnished by the Government. There wouldn't be enough orchards left in the valley to justify the operation of the apple business there.

Impatience with the ineptness of trial counsel, however justified it may be, should not be permitted to lead to so manifestly inequitable a decision.

For these reasons, it is respectfully urged that this petition for rehearing be granted, and that the judgment of the district court be upon further consideration reversed.

Respectfully submitted.

FRANCIS M. SHEA,
Assistant Attorney General.
EDWARD M. CONNELLY,
United States Attorney.
DAVID L. KREEGER,
Special Assistant to the Attorney General.
CECELIA H. GOETZ,
Attorney.

NOVEMBER 1943.

CERTIFICATE OF COUNSEL

I, counsel for the above-named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

DAVID L. KREEGER,
Special Assistant to the Attorney General.

U. S. GOVERNMENT PRINTING OFFICE: 1945

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

N. A. PEARSON,

Attorney for Appellant,

413 Arctic Building,
Seattle, Washington.

MESSRS. WELTS & WELTS,
MESSRS. HENDERSON & McBEE,

Attorneys for Appellee

Mount Vernon, Washington. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the Superior Court of the State of Washington
for the County of Skagit

(District Court No. 16)

No. 17018

LAURENCE P. BUNNEY, as guardian of Wilmer Bunney, a minor,

Plaintiff,

vs.

ASSOCIATED INDEMNITY CORPORATION, a corporation,

Defendant.

SUMMONS

The State of Washington

To the Said Associated Indemnity Corporation, a corporation, Defendant, You and each of you are hereby summoned and required to appear within twenty days after the service of this Summons, exclusive of the day of service, answer the complaint of the plaintiff, and serve a copy of your answer on the undersigned attorney for plaintiff, at his office below stated, and defend the above entitled action in the Court aforesaid; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint, which will be filed with the Clerk of said

Court, a copy of which is herewith served upon you.

WELTS & WELTS
HENDERSON & McBEE
Attorneys for Plaintiff
Postoffice Address: Mount Vernon, Skagit County, Washington.

[Endorsed]: Skagit County, Wash. Filed Apr. 6, 1942. Arthur Eliason, County Clerk, by Will B. Ellis, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. April 16, 1942. Judson W. Shorett, Clerk. by M. R. Rogers, Deputy. [2]

[Title of Superior Court and Cause.]

COMPLAINT

The plaintiff for cause of action against the defendant, alleges:

I.

That plaintiff is the duly appointed, qualified and acting guardian of the minor child, Wilmer Bunney, now of the age of fourteen years.

II.

That heretofore said minor through one Arthur Miles, as guardian ad litem, brought suit in the

Superior Court of the State of Washington from the County of Skagit in Cause No. 16431, against David Bunney and Clarence Bunney, doing business as Bunney Brothers, and Pound Motor Company, a corporation, the legal name of which was changed to Watkins Motor Company, for personal injuries suffered by said minor through the negligent operation and use by the said David Bunney of an automobile truck owned by said Bunney Brothers, together with necessary hospitalization and services of physicians and surgeons required for the care of said minor on account of said injuries, and on December 13, 1940, judgment was entered in said cause in favor of the plaintiff, Wilmer Bunney, and against all of said defendants, in the sum of $3780.20, together with costs of trial in the further sum of $37.00. This judgment the plaintiff as general guardian for said minor now owns, and said judgment is wholly unpaid and unsatisfied although [3] demand has been made upon this defendant to pay said final judgment.

III.

That after entry of said judgment, no appeal was taken or had therefrom by the defendants David Bunney and Clarence Bunney, doing business as Bunny Brothers. Appeal was taken from said judgment by the other defendant, and on said appeal the Supreme Court of the State of Washington held that as a matter of law, under the transactions had between Bunney Brothers and the other defendant, no completed sale of said motor truck

had been made to said motor company at the time of said injury, as delivery thereof was an essential part of said sale, and no delivery had been had, and said motor truck was used and operated by David Bunney at the time of injury of said minor, on behalf of the defendants David Bunney and Clarence Bunney, doing business as Bunney Brothers, and dismissed said action as against said motor company.

IV.

The defense of said suit against David Bunney and Clarence Bunney, doing business as Bunney Brothers, had been tendered to the defendant herein, which said defendant denied its liability and declined to defend said action.

V.

Prior to and at the time of said accident, the defendant Bunney Brothers were the owners of motor trucks which they operated on work of a nature requiring that a permit therefor be issued by the Department of Public Service of the State of Washington, known as the Department of Public Works, and they had procured such permits from the State of Washington and were operating their said trucks thereunder; and pursuant thereto, for a cash consideration and premium paid it, the defendant, Associated Indemnity Corporation, prior to the injury of said child as aforesaid, had issued and delivered to the defendants, Bunney Brothers, and there was in force at the time of said injury to said minor child a policy of liability insurance

executed by said defendant whereby and whereunder this defendant promised and agreed to pay any final judgment for personal injury to and including care of any person caused by accident [4] and arising out of the ownership, maintenance or use of a motor vehicle covered by said policy, including the endorsements thereon, and by the terms of said policy and its endorsements, this defendant further agreed and provided that upon its failure to pay any such final judgment, the judgment creditor could maintain an action in any court of competent jurisdiction to compel such payment. Said policy by its protective provisions, covered the motor vehicle through the use and operation of which said minor was injured.

VI.

The defendant has in its possession a duplicate of said policy and all endorsements thereon, and for that reason the same is not copied into or attached to this complaint.

VII.

That said final judgment against David Bunney and Clarence Bunney, doing business as Bunney Brothers, is a judgment for damages including care because of bodily injury sustained by said minor child, caused by accident and arising out of the ownership, maintenance or use of an automobile truck upon which this defendant then had in force its policy of liability insurance, the limits of liability on which exceeded the amount of the total judgment so entered in favor of said minor child.

Wherefore, Plaintiff prays judgment against said defendant in the sum of $3817.20, together with interest thereon from December 13, 1940, and that he have and recover his costs and disbursements herein, and such other, further and different relief as is deemed just and equitable in the premises.

WELTS & WELTS
HENDERSON & McBEE
Attorneys for Plaintiffs.

State of Washington,
County of Skagit—ss.

Laurence P. Bunney, being first duly sworn, on oath deposes and says: That he is the plaintiff named herein; that he has read the foregoing Complaint, knows the contents thereof, and that the [5] statements contained therein are true and correct.

LAURENCE P. BUNNEY

Subscribed and sworn to before me this 14th day of February, 1942.

R. V. WELTS
Notary Public in and for the State of Washington, residing at Mount Vernon.

[Endorsed]: Skagit County, Wash. Filed Apr. 6, 1942. Arthur Eliason, County Clerk, by Will B. Ellis, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, April 16, 1942. Judson W. Shorett, Clerk, by M. R. Rogers, Deputy. [6]

[Title of Superior Court and Cause.]

NOTICE OF INTENTION TO FILE PETITION FOR REMOVAL

To: Laurence P. Bunney, as guardian of Wilmer Bunney, a minor, Plaintiff, and to Henderson & McBee and Welts & Welts, his attorneys:

Notice Is Hereby Given that the defendant named in the above entitled action, to-wit, Associated Indemnity Corporation, a corporation, will on the 6th day of April, 1942, file in the Superior Court of the State of Washington in and for Skagit County, in which Court the above entitled action is now pending, its Petition and Bond for removal of said action from the said State Court to the District Court of the United States for the Western District of Washington, Northern Division.

Said Petition and Bond for removal will be presented to the Judge of the above named Court at the hour of 10:30 a.m. on said date, together with proposed Order for transfer and removal of said cause to the said District Court of the United States for the Western District of Washington, Northern Division, for the signature of said Judge; a copy of said proposed order being herewith served upon you, together with copies of said Petition and Bond for Removal.

N. A. PEARSON
Attorney for Defendant.

Copy Recd. 4/2/42.

WELTS & WELTS

Attorneys for Plaintiff.

[Endorsed]: Skagit County, Wash. Filed Apr. 6, 1942. Arthur Eliason, County Clerk. By Will B. Ellis, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. April 16, 1942. Judson W. Shorett, Clerk. By M. R. Rogers, Deputy. [7]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL OF CAUSE TO UNITED STATES DISTRICT COURT.

To the Honorable Judge of the Superior Court of the State of Washington, For Skagit County, Sitting at Mt. Vernon:

Comes now the defendants above named, Associated Indemnity Corporation, a corporation, and files its petition for the removal of the above entitled action from the Superior Court of the State of Washington in and for Skagit County, in which it is now pending, to the District Court of the United States for the Western District of Washington, Northern Division, held in the City of Bellingham in said District, and your Petitioner respectfully shows the Court:

I.

That the above entitled action was commenced in the said Superior Court of the State of Washington in and for Skagit County by mailing a copy of Summons and Complaint to the Home Office of defendant in San Francisco, State of California.

II.

That the above entitled action is one of a civil nature of which the District Courts of the United States have original jurisdiction, and is an action brought by the plaintiff to recover damages for personal injuries received by plaintiff Wilmer Bunney of the age of 14 years. That plaintiff has a judgment for damages against certain defendants because of bodily injury sustained by said minor child and alleges that the accident causing said injuries arose out of the ownership, maintenance and use of an automobile truck upon which it is alleged that this defendant then had in force its policy of liability insurance. [8]

III.

That the value of the matter in said action exceeds the sum of Three Thousand Dollars ($3000.00) exclusive of interest and costs. Damages sought in said action are in the amount of Three Thousand Eight Hundred Seventeen and 20/100 Dollars ($3817.20) together with interest from December 13, 1940, together with costs and disbursements.

IV.

That at the time of the commencement of this

action and prior to that time, and at all times subsequent thereto, the plaintiff was and now is a citizen and resident of the State of Washington. That the defendant in this action, seeking this removal, at the time of the commencement of this action and prior thereto, and at all times subsequent thereto was a resident of the State of California and a corporation organized under the laws of the State of California with offices in San Francisco, California.

V.

That the petitioner, Associated Indemnity Corporation, a corporation, the defendant in the above entitled action, desires to remove said action into the District Court of the United States for the Western District of Washington, Northern Division, and it presents and files herewith a good and sufficient bond, as provided by statute, conditioned as the law directs upon its entering the District Court of the United States for the Western District of Washington, Northern Division, within thirty days from the date of filing of this Petition, a certified copy of the record of this action, and for the payment by it of all costs which may be awarded by the said District Court against said Petitioner in the event said District Court should determine this action was improperly and wrongfully removed thereto.

Wherefore your Petitioner prays that said bond and surety be accepted, that this Petition for Re-

moval be granted, and that this Honorable Court proceed no further herein, except to accept and approve said bond, direct the Clerk of this Court to prepare certified transcript [9] of the record herein, and order the removal of said action to the District Court of the United States for the Western District of Washington, Northern Division.

N. A. PEARSON,
Attorney for Defendant and
Petitioner for Removal.
Office and P. O. Address:
413-15 Arctic Building
Seattle, Washington.
Seneca 4351.

Copy Recd. 4/2/42
WELTS & WELTS
Attorneys for Plaintiff.

State of Oregon,
County of Multnomah—ss.

Philip S. Carrell, being first duly sworn on oath, deposes and says: That he is the resident vice-president of the petitioner for the removal of the above cause to the District Court of the United States as prayed for in said petition; that the allegations of said petition are true to his own knowledge, except such as are therein stated on information and belief and as to such matters he believes them to be true.

PHILIP S. CARRELL

Subscribed and sworn to before me this 1st day of April, 1942.

[Seal] JOHN B. ALEXANDER

Notary Public in and for the State of Oregon, residing at Portland.

My commission expires April 15, 1945.

[Endorsed]: Skagit County, Wash. Filed Apr. 6, 1942. Arthur Eliason, County Clerk, by Will B. Ellis, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. April 16, 1942. Judson W. Shorett, Clerk, by M. R. Rogers, Deputy. [10]

[Title of Superior Court and Cause.]

ORDER OF REMOVAL

The Petition of the above named defendant, Associated Indemnity Corporation, a corporation, filed herein, praying for removal of the above entitled action from this Superior Court of the State of Washington in and for Skagit County, to the District Court of the United States for the Western District of Washington, Northern Division, being this date presented to this Court to be heard, the said defendant appearing by its attorney of record, N. A. Pearson, and the Court having considered said petition for removal and the bond for removal filed therewith, and being fully advised, and it appearing that this is an action of a civil nature of

which the District Courts of the United States have original jurisdiction; that the value of the matters in controversy, exclusive of interests and costs, is in excess of Three Thousand Dollars ($3000.00); that this action is a controversy wholly between citizens and residents of different states; that said action is pending undetermined in this court, and that the time limited by law or by rule of this court for the defendant to appear in and answer or otherwise plead to the Complaint therein has not yet expired; that no application has previously been made to any court or judge for removal of said action; it further appearing that said defendant has presented with said Petition and filed in this Court and cause a bond as provided by law, conditioned to pay all costs which may be awarded against it by the District Court of the United States to which removal is sought, and the Court finding that said bond and the surety thereon **[11]** are sufficient, and that a removal of said cause to the District Court of the United States is authorized and proper; now therefore

It Is Ordered, Adjudged and Decreed:

(1) That the said bond for removal and the surety thereon be and the same is hereby accepted and approved.

(2) That the above entitled cause be and it hereby is ordered transferred and removed to the District Court of the United States for the Western District of Washington, Northern Division, and the Clerk of this Court is hereby directed to prepare forthwith a complete copy of the record of this

Court in the above entitled action, and certify the same as a true copy of said record, and forward the same to the Clerk of the District Court of the United States for the Western District of Washington, Northern Division, at Bellingham, Whatcom County, Washington, within thirty days from filing of the Petition herein.

(3) That thereafter no further proceedings be had in this Court and cause unless and until remanded here by the said District Court of the United States.

Done in open court this 6th day of April, 1942.

W. L. BRICKEY,
Judge

Presented by:

N. A. PEARSON
Counsel for Defendant.

Copy received 4/2/42

WELTS & WELTS,
Attorneys for Plaintiff.

[Endorsed]: Skagit County, Wash. Filed Apr. 6, 1942. Arthur Eliason, County Clerk, by Will B. Ellis, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. April 16, 1942. Judson W. Shorett, Clerk, By M. R. Rogers, Deputy. [12]

[Title of Superior Court and Cause.]

REMOVAL BOND

Know All Men by These Presents, that we, Associated Indemnity Corporation, a corporation organized under the laws of California, as Principals, and National Surety Corporation, a New York corporation, having an office and place of business in the Colman Building, in the City of Seattle, and State of Washington, as Surety, are held and firmly bound to Laurence P. Bunney, as guardian of Wilmer Bunney, a minor, in the sum of Five Hundred ($500.00) Dollars, for payment whereof, well and truly to be made unto the said Laurence P. Bunney, his heirs, representatives, successors and assigns, we bind ourselves, our and each of our heirs, representatives, successors and assigns, jointly and severally, firmly by these presents.

Upon These Conditions, the said Associated Indemnity Corporation, a corporation, being about to petition the Superior Court of the State of Washington held in and for the County of Skagit for the removal of a certain cause therein pending, wherein the said Laurence P. Bunney is plaintiff, and the said Associated Indemnity Corporation, a corporation, are defendants, to the District Court of the United States, for the Western District of Washington, Northern Division.

Now, if the said Associated Indemnity Corporation, a corporation, shall enter into said District Court of the United States, within thirty (30) days

from the date of the fiiling of said petition for removal a certified copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise to remain in full force and virtue.

In Witness Whereof, we have hereunto set our hands and seals this 31st day of March, A.D. 1942.

ASSOCIATED INDEMNITY CORPORATION, a corporation.

By N. A. PEARSON
Their Attorney

NATIONAL SURETY CORPORATION, a corporation,

By J. H. LOBDELL
Attorney-in-fact.

Copy Recd. 4/2/42

[Seal] WELTS & WELTS
Attorneys for Plaintiff

Seal of the National Surety Corporation.

[Endorsed]: Skagit County, Wash. Filed Apr. 6, 1942. Arthur Eliason, County Clerk, by Will B. Ellis, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. April 16, 1942. Judson W. Shorett, Clerk, By M. R. Rogers, Deputy. [13]

[Title of Superior Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD ON REMOVAL

To the Clerk of the Superior Court of Skagit County:

Please prepare transcript on removal of all pleadings in the above entitled action and certify same as true copy of the record in said action, for removal to the United States District Court for the Western*d* District of Washington, Northern Division, in accordance with Order of Removal entered herein.

N. A. PEARSON
Attorney for Defendant.

Office and P. O. Address:
413-15 Arctic Building
Seattle, Washington
Seneca 4351

[Endorsed]: Skagit County, Wash., Filed Apr. 6, 1942. Arthur Eliason, County Clerk, by Will B. Ellis, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. April 16, 1942. Judson W. Shorett, Clerk, by M. R. Rogers, Deputy. [14]

[Title of Superior Court and Cause.]

CERTIFICATE

State of Washington,
County of Skagit—ss.

I, Arthur Eliason, County Clerk of Skagit County and ex-officio Clerk of the Superior Court of the State of Washington in and for Skagit County, do hereby certify that the foregoing is a full, true and correct transcript of the entire and complete record and files, including full, true and correct copies of all minute and journal entries that are not substantially embodied in said files, in cause No. 17018 entitled Laurence P. Bunney as guardian of Wilmer Bunney, a minor, Plaintiff vs. Associated Indemnity Corporation, a corporation, Defendant, as the same now appears on file and of record in said cause in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Superior Court this 14th day of April, 1942.

[Seal] ARTHUR ELIASON,
County Clerk,
By WILL B. ELLIS,
Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. April 16, 1942. Judson W. Shorett, Clerk. By M. R. Rogers, Deputy.

[Endorsed]: Filed April 16, 1942. [15]

In the District Court of the United States, Western District of Washington, Northern Division

No. 16

LAURENCE P. BUNNEY, as guardian of WILMER BUNNEY, a minor,

Plaintiff,

vs.

ASSOCIATED INDEMNITY CORPORATION, a Corporation,

Defendant.

ANSWER AND AFFIRMATIVE DEFENSE

Comes now the Associated Indemnity Corporation, a corporation, defendant above named, and in answer to the complaint of the plaintiff admits, alleges and denies as follows:

I.

In answer to paragraph 1, admits the same.

II.

In answer to paragraph 2, admits that said suit was brought against said defendants for personal injuries suffered by said minor. Admits that said suit was for hospitalization and services of physicians. Admits that on said date julgment was entered in favor of the plaintiff against said defendants in said sum. Admits that this defendant has refused to pay said judgment, and denies each and every other matter and thing alleged therein.

III.

In answer to paragraph 3, admits that said plaintiffs Bunney did not appeal from said judgment. Admits that the other defendant appealed. Admits that said judgment was reversed, and denies each and every other matter and thing alleged therein.

IV.

In answer to paragraph 4, admits the same.

V.

In answer to paragraph 5, admits that prior to the accident up to the day before the accident, to-wit, January 4th, 1940, said [16] accident occurring on January 5th, 1940, said plaintiffs Bunney Brothers owned motor trucks. Admits that they had a permit issued by the Department of Public Service, known as the Department of Public Works. Admits that for premium paid to it defendant Associated Indemnity Corporation up to January 4th, 1940, had issued and delivered to the plaintiffs Bunney Brothers a policy of liability insurance executed by the defendant containing certain provisions and agreements that under certain conditions the vehicle covered thereby would be protected by liability insurance under the terms of said policy, and deny each and every other matter and thing alleged therein.

VI.

In answer to paragraph 6, admits the same.

VII.

In answer to paragraph 7, deny the same and each and every part thereof.

For a First Separate and Affirmative Defense defendant alleges:

I.

That at all times herein mentioned defendant, Associated Indemnity Corporation was an insurance corporation authorized to do business in the State of Washington, and has paid all fees due the State of Washington.

II.

That on the 14th day of December, 1939, it issued its Policy No. AF-253987 covering a 1935 Ford Dump Truck, Motor No. BB18-1304989, from December 14th, 1939 to December 14th, 1940, for public liability with policy limits of $5000.00 for one person injured and $10,000.00 for more than one person injured. That David Bunney and Clarence Bunney, doing business as Bunney Brothers, were the assured under said policy. That a copy of said policy and endorsements is in the possession of the plaintiffs. [17]

III.

That said 1935 truck was on the 4th day of January, 1940, sold, exchanged and transferred to the Pound Motor Company, a corporation, and on said date a 1938 Ford Truck was purchased by said Bunney Brothers to use in place of said 1935 Ford

Truck and said 1938 Ford Truck was delivered to said Bunney Brothers on January 4th, 1940, the day before the accident in question occurred. All interest of said Bunney Brothers in said 1935 Ford Truck was transferred to said Pound Motor Company on said 4th day of January, 1940, and actual possession of said 1938 Ford Truck was taken on said January 4th, 1940. That all right, title and interest of said Bunney Brothers in said 1935 Ford Truck ceased on January 4th, 1940, when title thereto passed to the said Pound Motor Company.

That David Bunney desired to retain the steel body which was on said truck and it was agreed between the Pound Motor Company and Bunney Brothers that he retain said steel body replacing it with a wooden body which was on another truck owned by said Bunney Brothers.

That in attempting to move the 1935 Truck on said January 5th, 1940, from its position in front of Clarence Bunney's home it was found that it was impossible to move said truck because the wheels were mired in the mud and the engine would not function properly. It was thought that there was some defect in the fuel pump of said 1935 Truck which interfered with the proper functioning of its carburetor.

David Bunney procured a can of gasoline and at the same time employed his nephew, Wilmer Bunney, a minor, 13 years of age, and son of Clarence Bunney to assist in the operation and Wilmer Bunney was instructed to pour the gasoline from

the can into the carburetor of the 1935 Truck. In doing this he climbed upon the truck and was seated upon the fender and as he started to pour the gasoline into the carburetor Daniel Bunney, another brother who was seated at the wheel of the truck, attempted to start the motor. The motor back fired and ignited the gasoline as a result of which Wilmer Bunney received the [18] *the* burns for which the action was brought, all of said matters occurring on the 5th day of January, 1940.

IV.

That said policy of liability insurance covers the general liability of David Bunney and Clarence Bunney, doing business as Bunney Brothers, and does not insure the several liabilities of said two named persons. That if at said time said Wilmer Bunney was injured through the negligence of any one it was the individual negligence of David Bunney who had charge of the operations at the time. That Clarence Bunney was not present, nor involved, nor had any interest in the matter and said injury is therefore outside the terms of the said policy.

That under Exclusions of said policy on Page 3 thereof, paragraph 5, "This policy does not apply * * * under Coverage A, nor under Insuring Agreement II, to bodily injury to or death of any employee of any insured while engaged in the business of any Insured, other than domestic employment, or in the operation, maintenance, or repair

of the Automobile; or to any obligation for which any Insured may be held liable under any workmen's compensation law." That at said time said Wilmer Bunney was an employee of said insured and therefore said policy does not cover any injuries he may have received.

V.

That said policy at said time had attached to it an endorsement known as "Passenger Hazard Exclusion Endorsement" as follows: "It is agreed that the insurance afforded by the policy shall not apply with respect to liability arising from accidents to any person while entering upon, riding in or alighting from the automobile." That at said time said Wilmer Bunney was entering upon, riding in or upon said automobile at the time of said accident and therefore the policy did not cover him at the time of said injury. [19]

VI.

That the policy provides as follows: "9. Notice of Accident-Claim or Suit. Upon the occurrence of an accident, written notice shall be given by or on behalf of the Insured to the Company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the Insured and also reasonably obtainable information respecting the time, place, and circumstances of the accident, the name and address of the injured and of any available witnesses. If claim is made or suit is brought against the Insured, the

Insured shall immediately forward to the company every demand, notice, summons, or other process received by him or his representative." That said accident occurred on January 5th, 1940, and was never reported to the company or any of its representatives or agents until February 1st, 1940. That there was no reason why notice of the accident should not have been given immediately to the company, its agents or representatives; that the failure so to do voided said policy as regards that particular accident. That by reason of the failure to promptly notify defendant company, the defendant was greatly prejudiced thereby and while it did thereafter investigate said accident it did so only upon a full reservation of all its rights under said policy.

VII.

That paragraph V on page two of said policy provides as follows: "Automatic Insurance for Newly Acquired Automobiles. If the named Insured who is the owner of the Automobile acquires ownership of another automobile, such insurance as is afforded by this policy applies also to such other automobile as of the date of its delivery to him, subject to the following additional conditions: (1) if the company insures all automobiles owned by the named Insured at the date of such delivery, insurance applies to such other automobile if it is used for pleasure purposes or in the business of the named Insured as expressed in the Declarations, but only to the extent [20] applicable to all such previously

owned automobiles; (2) if the company does not insure all automobiles owned by the named Insured at the date of such delivery, insurance applies to such other automobile if it replaces an automobile described in this policy and may be classified for the purpose of use stated in this policy, but only to the extent applicable to the replaced automobile; (3) the insurance afforded by this policy automatically terminates upon the replaced automobile at the date of such delivery; * * *. That said policy also contains the following under "Exclusions" page 3: "This Policy does not Apply: 2 * * * or to any accident which occurs after the transfer during the policy period of the interest of the named Insured in the Automobile, without the written consent of the company." That defendant corporation gave no such written consent.

That the entire interest of the insured in said 1935 Truck was transferred to the Pound Motor Company on January 4th, 1940, and that on January 4th, 1940, the insured purchased a 1938 Ford Truck from said Pound Motor Company trading said 1935 Ford Truck in as part of the purchase price and paying the balance due on said 1938 Ford Truck in cash, and that on January 4th, 1940, the insured took delivery and actual physical possession of the new 1938 Ford Truck which was purchased to replace the 1935 Ford Truck. That by reason of the matters herein alleged said insurance had automatically terminated upon said 1935 Truck and automatically covered the 1938 Ford Truck upon

the taking possession of said 1938 Ford Truck and therefore the policy did not cover after January 4th, 1940, said 1935 Ford Truck.

VIII.

That said policy provides as follows, page three thereof: "This Policy does not Apply: 4 under Coverages A, B, C and C-1, nor under Insuring Agreement II, while the Automobile is operated by any person under the age of 14 years * * *." That said Wilmer Bunney was assisting in the operation of said automobile truck [21] and he was at that time of the age of 13 years and therefore said accident was not covered by the terms of said policy.

IX.

That by reason of the matter and things herein alleged defendant Associated Indemnity Corporation did not cover said 1935 Ford Truck with liability insurance at the time of said accident and is not liable for any injury or damage plaintiff may have sustained on or about said 1935 Ford Truck upon said date.

Wherefore defendant prays that said action be dismissed and for its costs and disbursements herein.

N. A. PEARSON
Attorney for Defendant.
Office and P. O. Address:
413 Arctic Building
Seattle, Washington.

State of Oregon,
County of Multnomah—ss.

Philip S. Carrell, being first duly sworn on oath, deposes and says: That he is the resident vice-president of the Associated Indemnity Corporation, a corporation, defendant in the above entitled action; that he has read the above and foregoing Answer and Affirmative Defense, knows the contents thereof and the same is true as he verily believes.

[Seal] PHILIP S. CARRELL

Subscribed and sworn to before me this 7th day of May, 1942.

JENNIE BENEFIEL,
Notary Public in and for the State of Oregon, residing at Portland.
My Com. Exp. Mar. 16, 1945.

(Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, May 9, 1942. Judson W. Shorett, Clerk. By M. R. Rogers, Deputy.)

[Endorsed]: Filed May 9, 1942. [22]

[Title of District Court and Cause.]

REPLY

Replying to the first separate and affirmative defense set forth in defendant's answer, the plaintiff alleges:

I.

He admits that Associated Indemnity Corporation issued a policy of liability insurance with policy limits of $5,000.00 for one person injured and $10,000.00 for more than one person injured. That David Bunney and Clarence Bunney, and each of them, were the assured; and deny each and every other matter and thing alleged therein, and allege that said company was fully informed and cognizant of the uses made by said parties of their motor vehicles covered by said liability insurance policy and the method of use each made of said vehicles, and included in the coverage of said policy was a 1935 Ford dump truck mentioned in pleadings of said parties.

II.

Replying to Paragraph III, the plaintiff admits that on January 4, 1940, negotiations were entered into for the sale of said truck to Pound Motor Company, a corporation; admit that David Bunney, on behalf of himself and Clarence Bunney, doing business as Bunney Brothers, took delivery of a 1938 Ford truck from Pound Motor Company on January 4, 1940; admit that in said negotiations said David Bunney desired to retain the steel body which was on the 1935 truck, and it was agreed that he should do so; admit that a wooden body which was on another truck, under these negotiations was to be placed on the 1935 [23] truck before delivery thereof to Pound Motor Company; admit that in attempting to move the 1935 truck on January 5,

1940, to place it in a condition for delivery to Pound Motor Company, the wheels thereof became mired in the mud; admit that David Bunney procured a can of gasoline and gave it to Wilmer Bunney, a minor, son of Clarence Bunney, and instructed him to pour the gasoline from the can into the carburetor of the 1935 truck; admit that he started to pour the gasoline into the carburetor; admit that an attempt was made to start the motor of said truck; admit that the motor backfired, the gasoline ignited and that Wilmer Bunney received injuries for which action was brought and judgment was entered; deny each and every other allegation contained in said paragraph, and allege that the sale of said 1935 Ford truck to Pound Motor Company had not been completed; that no delivery of the property under said sales negotiations had been made to Pound Motor Company but that the work of delivery was in process when the accident occurred, and allege that the 1938 truck, delivery of which was taken on January 4th from Pound Motor Company was hooked onto and attached to the 1935 truck, furnishing pulling power therefor, and assisting in starting the motor of the 1935 truck through pulling thereon, when said injury to said child occurred through the backfiring of the motor of said 1935 truck.

III.

Replying to paragraph IV, the plaintiff denies that the policy of liability insurance failed to cover the business and transaction in which David Bunney was then engaged, and alleges that it did so

cover said transaction, and denies that Wilmer Bunney was an employee of said insured at the time of said injury to him, and denies each and every other allegation contained in said paragraph.

IV.

Replying to Paragraph V, the plaintiff denies that Wilmer Bunney at the time of his injury was entering upon or riding *it* or upon said automobile truck within the meaning of the passenger hazard exclusion endorsement mentioned in said Paragraph V if said exclusion endorsement existed, and denies each and every other allegation con- [24] tained in said paragraph.

V.

Replying to Paragraph VI, the plaintiff admits that the accident occurred on January 5, 1940; has not information sufficient to form a belief as to the other matters, facts and things therein set forth, and denies the same and each and every allegation therein contained, and alleges that if no report was made until February 1, 1940, the defendant was in no manner prejudiced thereby; that defendant immediately entered upon a full and complete investigation; that all information, data and facts pertaining to the subject matter existing on January 5th were similarly existing on February 1st; all witnesses to the occurrence were available to and interviewed by the defendants, and full and complete information had from them on or about February 1, 1940. That said defendant

was assisted in said investigation by counsel for said minor child although his interests were adverse to the interests of the defendant and defendant was permitted to interview and take statements from all witnesses adverse to defendant as well as favorable to defendant, and did so; and was assisted in obtaining full knowledge of all facts whatsoever pertaining to said occurrence, and did so; and defendants were in no manner prejudiced and waived any claim of lack of timeliness of notice of the occurrence if notice was not given.

VI.

Replying to Paragraph VII, the plaintiff denies that the coverage of said liability policy as applied to the 1935 truck automatically terminated; he does not know whether the coverage also became applicable to and applied to the 1938 Ford truck which was delivered by Pound Motor Company, but alleges that both trucks were covered by the provisions of said policy at the time the occurrence happened, all as provided in said policy and the riders attached thereto and a part thereof, and both trucks participated in the occurrence, and denies each and every other allegation contained in said paragraph. [25]

VII.

Replying to Paragraph VIII, plaintiff denies the same and each and every allegation therein contained.

Wherefore, plaintiff prays judgment against the

defendant in accordance with the demands of his complaint.

WELTS & WELTS
HENDERSON & McBEE
Attorneys for Plaintiff

State of Washington
County of Skagit—ss.

Laurence P. Bunney, being first duly sworn, on oath deposes and says: That he is the plaintiff named herein; that he has read the foregoing Reply, knows the contents thereof and that the statements therein contained are true and correct.

LAURENCE P. BUNNEY

Subscribed and sworn to before me this 23rd day of May, 1942.

[Seal] R. V. WELTS
Notary Public in and for the State of Washington, residing at Mt. Vernon.

(Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, May 28, 1942. Judson W. Shorett, Clerk. By M. R. Rogers, Deputy.)

[Endorsed]: Filed May 28, 1942. [26]

[Title of District Court and Cause.]

COURT'S CERTIFICATION OF STATEMENT OF FACTS ON PRE-TRIAL HEARING

This cause coming on for pre-trial hearing under Rule 16 of the Rules of Civil Procedure, plaintiff

appearing by Messrs. Welts & Welts, and Messrs. Henderson & McBee, and defendant appearing by Mr. N. A. Pearson, and the hearing on pre-trial having been had, the following facts were found and certified by the Court:

On January 4, 1940, the Registration certificate for the truck on which the accident happened was delivered to Pound Motor Company, and Bunney, the owner of the old truck on which the accident happened stated that he desired to take the steel body off his old truck and put it on the new truck and put on the old truck the wooden body which was to be a part of the equipment bought by Pound.

When the certificate of title was delivered Bunney said: "When I come to take delivery on the 1938 truck I asked him if I could have the 1935 truck a few days, that I was going to be rather busy. 'Yes,' he said, 'but will you change the bodies and bring it down as soon as you can.' I said I would."

It is agreed that the statement of facts in Cause No. 16431 in the Superior Court of Skagit County, entitled Arthur Miles as Guardian ad litem for Wilmer Bunney, a minor, and individually, Plaintiff, vs. David Bunney and Clarence Bunney, etc., et al, Defendants, is a correct transcript of the testimony in that case and may be used on the trial of this case for reference purposes without calling the official court reporter who transcribed the same. [27]

It is agreed that the following defendant's exhibits may be considered without any further proof and are only open to objection on the question of materiality on the trial, to-wit:

A-1, Automobile Purchase Order

A-2, Receipt

A-3, Chattel Mortgage

same being photostatic copies of originals.

The following Plaintiff's exhibits are admitted in evidence as follows:

1. Copy of insurance policy issued to David Bunney and Clarence Bunney by the defendant Associated Indemnity Corporation on December 14, 1939 and expiring December 14, 1940, being insurance policy No. 253987 together with all endorsements placed thereon by the defendant and being the policy and endorsements in this law suit. Also the certified copy of the permit issued by the Department of Public Service of the State of Washington to David and Clarence Bunney dated October 16, 1939 and in effect until the time subsequent to the injury herein in question under which David Bunney was operating his vehicle.

Attorneys for the defense do not admit that the permit was in effect at the time of the injury.

2. Certified copy of Rules 30, 31, 33, 34 and General Order No. 68 of the Department of Public Service of the State of Washington, which were in effect on January 5, 1940, and marked Exhibits No. 2.

3. Certified copy of the Judgment rendered in Cause No. 16431 of the Superior Court of Skagit County. Said judgment is unpaid and unsatisfied. Marked Exhibit No. 3.

It is admitted that the plaintiff is the general guardian of the infant and owns the judgment.

It is admitted that the Insurance Company is authorized to do business in the State of Washington and is duly licensed, and has paid all fees due the State of Washington. [28]

It is agreed that the Judgment (Plaintiff's Exhibit 3) was entered for personal injury and necessary and required hospitalization and medical care caused by accident arising from use of the truck named in defendant's policy, being the 1935 truck.

It is agreed that on the 5th day of January, 1940, pursuant to notice from the W. P. A. Authorities to assemble his equipment for inspection on a W. P. A. hauling job in which the Bunneys, including David Bunney, were to use David Bunney's truck under Public Service Certificate, David Bunney with the assistance of his brother Daniel Bunney started to move the 1935 truck so that the steel body could be taken therefrom and put on the 1938 chassis and the wooden body could be placed on the 1935 truck and it could be delivered to Pound Motors.

After he had moved the 1935 truck a few feet one of the wheels bogged down causing the vehicle to tilt so that the gas would not feed and the motor would not run. Thereupon David Bunney got the

1938 chassis and cab, called the 1938 truck, and hitched on to the other truck and attempted to pull the vehicle out, by means of a physical connection between the two trucks. Thereupon he called to the child Wilmer Bunney who was playing basket ball and told him to come and pour a can of gasoline into the carburetor of the 1935 truck. After the second call the child came, David Bunney giving him a tomatoe can full of gasoline, removed the flame arrestor from the carburetor of the truck, and the child started to pour the gasoline into the carburetor of the 1935 truck. David Bunney got into the 1938 truck which was physically connected to the 1935 truck and pulled on the 1935 truck. The brother Daniel Bunney was sitting in the 1935 truck at the steering wheel to guide it. It is in dispute between the parties whether the back firing of the motor of the 1935 truck was produced by Daniel Bunney attempting to start the motor with the starter of that truck, or whether it was started by the action of [29] David Bunney in pulling on the 1935 truck with the 1938 truck.

The defendant has no testimony to offer that it was prejudiced by reason of the failure to give notice of the accident at the time it occurred instead of February 1, 1940. The plaintiff will offer affirmative testimony that the defendant was not and could not be prejudiced by failure to give such notice for the following reasons:

First, the only persons present when the accident occurred were the mother of the child, the

child, Daniel Bunney and David Bunney. Immediately following notification to the insurance company its representative came to Mt. Vernon and contacted Mr. R. V. Welts who took the representative to the Clarence Bunney home and saw that he met Mrs. Bunney, the child's mother and interviewed her in Mr. Welt's presence, and was authorized by Mr. Welts to interview her if he wished in his absence, and took a complete statement of all facts which she knew. He was also put in touch with the Brother Daniel Bunney, and his own policy holder David Bunney, interviewed them and each of them and took statements from them pertaining to the accident. That all of these parties continued to reside in Mt. Vernon for a period of time after they were interviewed by the insurance company, and thereafter the child and his parents moved to Everett where they have been and are now located. The operators of the Pound Motor Company who had anything to do with the truck transaction here in question were G. A. Pound and Orville Pound and none other. They remained in Mt. Vernon and were interviewed by the insurance company. G. A. Pound is still there and the son Orville is at Fort Lewis having been in the armed services now for only a few months. No facts known by counsel were withheld from the insurance company. As much was learned as could have been learned at any other time prior to the investigation. The defendant has no refuting evidence to offer.

The only open issue upon the facts is the ownership of [30] the 1935 truck at the time of the accident and whether the child was standing on the ground or whether he was sitting on the fender of the truck at the time the gasoline was poured into the carburetor, and what Daniel Bunney and David Bunney were doing at the time of the accident with relation to starting the 1935 truck and the pulling by the 1938 truck, and Daniel Bunney stepping on the starter of the 1935 truck.

Dated this 6th day of October, 1942.

JEREMIAH NETERER
U. S. District Judge

Approved:

.....
Attorney for plaintiff

.....
Attorney for defendant

[Endorsed]: Filed Oct. 6, 1942. [31]

[Title of District Court and Cause.]

DEFENDANT'S REQUESTED INSTRUCTIONS [32]

No.

You are instructed that the policy of liability insurance issued by the defendant company covered the general liability of David Bunney and Clarence Bunney, doing business as Bunney Brothers, and did not insure the individual and several liabil-

ities of said brothers, and if you find that at the time said Wilmer Bunney was injured that it was the individual liability and business of David Bunney and that he had charge of the operations at that time and you find that said Clarence Bunney had no interest in said truck or matter and that said transferring of said body was not part of the business of Bunney Brothers, as a partnership, then I charge you that said insurance policy did not apply at the time of said accident. [33]

No.

The Court instructs the jury that you are to find for the defendant. [34]

No.

You are instructed that if you find from the evidence in this case that the 1935 Ford Truck which was covered by the defendant's insurance policy was sold and the title thereto transferred to Pound Motor Company on the 4th day of January, 1940, the day before the accident occurred, then I charge you that the insurance policy no longer applied to the 1935 Ford Truck and your verdict must be for the defendant. [35]

No.

You are instructed that the mere fact that David Bunney desired to transfer the body from the 1935 Ford Truck is no indication, and is not to be taken by you that he had any title in or to said truck on and after the 4th day of January, 1940, if you

find that he sold and delivered title of said truck to other parties on January 4th, 1940. [36]

No.

If you find that Wilmer Bunney was an employee working for either David Bunney or Clarence Bunney at the time he was working on said truck then I charge you that your verdict in this case must be for the defendant. [37]

No.

If you find from the evidence that Wilmer Bunney was entering upon, riding in or upon, said automobile at the time of said accident that he would not be covered under the policy and your verdict must be for the defendant. In this respect you are instructed that the word "riding" does not necessarily mean that the truck would have to be in motion the fact that he was in or on said truck would be sufficient to come within the meaning of the word riding. [38]

No.

You are instructed that if you find from the evidence in this case that Bunney Brothers did not give prompt notice to the insurance company of the accident as soon as practicable then I charge you there would be no recovery in this case if you find that by reason of said delayed notice the insurance company was prejudiced in any way of said delayed notice. [39]

No.

You are instructed that if you find from the evidence in this case that the 1935 Truck was transferred to the Pound Motor Company on January 4th, 1940, and that on said date said Bunney Brothers, or either of them, purchased a 1938 Ford Truck trading said 1935 Ford Truck to said Pound Motor Company as part of the purchase price and paying the balance due on said 1938 Ford Truck in cash and that on said date, to-wit, January 4th, 1940, said Bunney Brothers, or either of them, took delivery and actual physical possession of the new 1938 Ford Truck then I charge you that said insurance written by defendant on said 1935 Truck automatically terminated upon said 1935 Truck and automatically covered the 1938 Ford Truck upon the taking possession of the said 1938 Ford Truck and that the policy did not cover the said 1935 Ford Truck after January 4th, 1940, and if you find that the accident occurred on January 5th, 1940, then I charge you there would be no recovery in this case and your verdict must be for the defendant. [40]

No.

You are instructed that the policy did not apply to any vehicle while being operated by any person under the age of 14 years and if you find that said Wilmer Bunney was under the age of 14 years and was assisting in the operation of said truck at the time of the accident then I charge you that

said insurance policy did not apply at the time of said accident and your verdict must be for the defendant.

N. A. PEARSON,
Attorney for Defendant.

[Endorsed]: Filed Oct. 7, 1942. [41]

PLAINTIFF'S EXHIBIT No. 1

S. F. No. 1052-1939-42C. 17491. Duplicate.
Permit No. CC 7034

PERMIT
State of Washington
Department of Public Service.

PERMIT FOR THE OPERATION OF MOTOR PROPELLED VEHICLES

Order No. M. V. 32122
P-9797

This is to certify: That

Bunney, David & Clarence	CC-7034
Bunney Bros.	
124 11th Street S.	D-1
Mt. Vernon, Wash.	

is authorized to operate motor vehicles as a Common Carrier in the transportation of commodities and in the territory described herein. This permit is issued pursuant to the provisions of Chapter 184,

Plaintiff's Exhibit No. 1—(Continued)

Laws of 1935, and acts amendatory thereof and supplemental thereto.

Intrastate, irregular route, non-radial service as a carrier engaged in Dump Truck operations, in King, Snohomish and Skagit Counties.
L-D-7-M.V. 32122-10-16-39

(Extension Granted)
(M.V. No. 32915)
(Feb 23 1940)

This permit does not authorize any interstate operations over the highways of the State of Washington except to the extent permitted by the Constitution and laws of the United States. [42]

Dated at Olympia, Washington, October 16, 1939.

DIRECTOR OF PUBLIC SERVICE
By CHARLES H. KENT
Superintendent of Transportation

The Commodities that you haul and the territory that you cover are governed exclusively by the information shown hereon.
ap [43]

ASSOCIATED INDEMNITY CORPORATION

110.—Truckmen—Hauling Under Contract

The named Insured having declared, as evidenced by the acceptance of this endorsement, that all of

Plaintiff's Exhibit No. 1—(Continued)

the commercial automobiles which he owns will be used during the policy period exclusively for commercial purposes in the business of Hugo Sigismund, Contractor, Everett, Wash. and that the regular and frequent use of the commercial automobiles will be confined to the area within a fifty mile radius of the place of principal garaging of such automobiles as stated in the policy, it is agreed that no insurance for Bodily Injury Liability or for Property Damage Liability is afforded while any commercial automobile owned by the named Insured is used in the business of any person, firm or corporation other than the above named.

This endorsement forms a part of Policy No. 253987 AF issued to David Bunney & Clarence Bunney d/b/a Bunney Bros. by the Associated Indemnity Corporation of San Francisco, California, and is effective from August 7, 1940. (12:01 A. M. Standard Time)

ASSOCIATED INDEMNITY CORPORATION
C. W. FELLOWS
President
C. C. ANDERSON
Secretary

Countersigned at Everett, Washington.

CLARK INVESTMENT CO.
By CLARK SALISBURY
(Duly Authorized Representative)

(Received Aug. 9, 1940. Dept. Pub. Serv.) [44]

Plaintiff's Exhibit No. 1—(Continued)

ASSOCIATED INDEMNITY CORPORATION
and
ASSOCIATED FIRE & MARINE INSURANCE COMPANY

Notice Is Hereby Given That for the remainder of the policy period the truck insured hereunder will be operated in and in the vicinity of Everett, Washington. It will not be regularly or frequently operated into a higher rated territory than Territory IV, Washington.

The additional premium for this endorsement is $3.34. Effective: August 7, 1940. 12:01 A. M.

Nothing herein contained shall be held to waive, alter, vary or extend any of the stipulations, agreements, or limitations of this Policy, other than as above stated.

This Endorsement, issued by the Associated Indemnity Corporation and Associated Fire & Marine Insurance Company, when countersigned by a duly authorized official or representative, shall form a part of Policy No. 253987 AF issued to David Bunney and Clarence Bunney d/b/a Bunney Bros. and shall become effective on the 7th day of August, 1940, at 12:01 A. M. Standard Time at the place of countersignature, and shall terminate with the Policy.

ASSOCIATED INDEMNITY
CORPORATION
L. S. MOORHEAD
President
C. C. ANDERSON
Secretary

Plaintiff's Exhibit No. 1—(Continued)

ASSOCIATED FIRE & MARINE INSURANCE COMPANY

L. S. MOORHEAD
President

C. C. ANDERSON
Secretary

Policy dates from December 14, 1939, to December 14, 1940. Countersigned at Everett, Washington, on August 7, 1940.

Agent

CLARK INVESTMENT CO.

Counsersigned by

CLARK SALISBURY

(Received Aug. 9, 1940. Dept. Pub. Serv.) [45]

ASSOCIATED INDEMNITY CORPORATION
and
ASSOCIATED FIRE & MARINE INSURANCE COMPANY

It is hereby understood and agreed that the name of the assured is completed to read:

David Bunney & Clarence Bunney d/b/a Bunney Bros.

Nothing herein contained shall be held to waive, alter, vary or extend any of the stipulations, agreements, or limitations of this Policy, other than as above stated.

This Endorsement, issued by the Associated In-

Plaintiff's Exhibit No. 1—(Continued)

demnity Corporation and Associated Fire & Marine Insurance Company, when countersigned by a duly authorized official or representative, shall form a part of Policy No. AF 253987 issued to David Bunney and Clarence Bunney d/b/a Bunney Bros. and shall become effective on the 14th day of December, 1939, at 12:01 A. M. Standard Time at the place of countersignature, and shall terminate with the Policy.

ASSOCIATED INDEMNITY CORPORATION
L. S. MOORHEAD
President
C. C. ANDERSON
Secretary
ASSOCIATED FIRE & MARINE INSURANCE COMPANY
L. S. MOORHEAD
President
C. C. ANDERSON
Secretary

Policy dates from December 14th, 1939, to December 14th, 1940. Countersigned at Everett, Washington on January 25th, 1940.

Agent
CLARK INVESTMENT CO.
Countersigned by
/s/ CLARK SALISBURY

(Received Mar. 1, 1940. Dept. Pub. Serv.) [46]

Plaintiff's Exhibit No. 1—(Continued)

Associated Indemnity Corporation
Associated Fire & Marine Insurance Company

ADDITION, SUBSTITUTION OR ELIMINATION OF AUTOMOBILE ENDORSEMENT

In consideration of the premium adjustment shown herein, it is hereby understood and agreed that the below described Policy is extended to provide insurance against direct loss or damage from such of the Coverages described in the Policy for which Additional or Return premiums or the words "No Charge" are shown in the Schedule of Coverage hereof, with respect to the automobile described in Item 1, and that the automobile described in Item 2 hereof is eliminated from coverage under the Policy. The limit of the Company's liability against each such Coverage shall be as stated herein, subject to all of the terms of the policy having reference thereto.

Item 1—(Description of Automobile Added)

Trade Name—Ford.

Year, Model—Yr. 1938, Mod.—.

No. of Cyls.—V8.

Type of Body—(If Truck, State Tonnage)—1½ T. Dump Truck.

Car Numbers—(Give Both Numbers) Mtr. 18-4295384, Ser.—.

Factory List Price—.

Actual Cost to Insured—.

Purchased—Month, Year, New or 2d Hand—.

Plaintiff's Exhibit No. 1—(Continued)

1. The named Insured is the sole owner of the Automobile, except as herein stated:——

2. The Automobile will be principally garaged and used in the Town, County and State shown in the address of the Insured in the Policy, unless otherwise specified herein——

3. The purposes for which the Automobile is to be used are Commercial only. May be used for occasional personal and family purpose.

4. Loss, if any, other than under Bodily Injury Liability and Property Damage Liability Coverages is payable to——

Item 2—(Description of Automobile Eliminated)

Year—1935

Trade Name—Ford

Type of Boy—1½ T. Dump Truck

Motor Number—BB18-1304989

Serial Number——

Plaintiff's Exhibit No. 1—(Continued)

SCHEDULE OF COVERAGE

Only those Coverages for which Additional or Return premiums or the words "No Charge" are stated below are insured against.

Associated Indemnity Corporation

Coverages	Limits of Liability	Premiums Additional	Premiums Return
Bodily Injury Liability	$5,000.00 each person and subject to that limit for each person $10,000.00 each accident	$ No Charge	$.....
Property Damage Liability	$5,000.00 each accident	$ No Charge	$.....
Collision	Actual Cash Value, $..... deductible	$.....	$.....
Accidental Collision or Upset—"Convertible"—$..... Additional premium for "full coverage" payable upon reporting an accidental collision	Actual cash value at time of loss	$.....	$.....
"Additional" Coverage Per Endorsement Form No.....	As stated in Endorsement No..... attached to Policy.	$.....	$.....

Plaintiff's Exhibit No. 1—(Continued)

Associated Fire & Marine Insurance Company

Coverages	Limits of Liability	Premiums Additional	Return
Fire, Lightning and Transportation	Maximum Amount of Insurance. $..... Rate $.....	$.....	$.....
Theft, Robbery or Pilferage (Broad Form)	Maximum Amount of Insurance. $..... Rate $.....	$.....	$.....
Theft, Robbery or Pilferage (Deductible Pilferage Form)	Maximum Amount of Insurance. $..... Rate $.....	$.....	$.....
Fire, Lightning and Transportation (Coverage I) and Theft, Robbery or Pilferage—Broad Form (Coverage II)	Actual Value	$.....	$.....
"Additional" Coverage Per Endorsement Form No.....	As stated in Endorsement No..... attached to Policy.	$.....	$.....

Total Net ..... Premium for this Endorsement $.....

(Insert "Additional" or "Return" or "No Charge")

Plaintiff's Exhibit No. 1—(Continued)

Nothing herein contained shall be held to waive, alter, vary or extend any of the agreements, stipulations, conditions or limitations of this Policy, other than as above stated. This Endorsement, issued by the Associated Indemnity Corporation and Associated Fire & Marine Insurance Company, when countersigned by a duly authorized official or representative, shall form a part of Policy No. 253987 AF issued to David Bunney and Clarence Bunney, dba Bunney Bros., and shall become effective on the 8th day of January, 1940, at 12:01 A. M. Standard Time at the place of countersignature, and shall terminate with the Policy.

ASSOCIATED INDEMNITY CORPORATION
L. S. MOORHEAD
President
C. C. ANDERSON
Secretary
ASSOCIATED FIRE & MARINE INSURANCE COMPANY
L. S. MOORHEAD
President
C. C. ANDERSON
Secretary

Countersigned at Everett, Washington, on January 9, 1940.

By CLARK INVESTMENT CO.
Authorized for the purpose.
/s/ CLARK SALISBURY

(Received Jan. 11, 1940. Dept. Pub. Serv.) [47]

Plaintiff's Exhibit No. 1—(Continued)

ASSOCIATED INDEMNITY CORPORATION
and
ASSOCIATED FIRE & MARINE INSURANCE COMPANY

Copy

PASSENGER HAZARD EXCLUSION ENDORSEMENT

It is agreed that the insurance afforded by the policy shall not apply with respect to liability arising from accidents to any person while entering upon, riding in or upon ar alighting from the automobile.

Signed and Accepted
DAVID BUNNEY

Signed and Accepted
CLARENCE BUNNEY

Nothing herein contained shall be held to waive, alter, vary or extend any of the stipulations, agreements or limitations of this Policy, other than as above stated.

This Endorsement, issued by the Associated Indemnity Corporation and Associated Fire & Marine Insurance Company, when countersigned by a duly authorized official or representative, shall form a part of Policy No. 253987 AF issued to David and Clarence Bunney (Bunney Bros.) and shall become effective on the 14 day of December, 1939 at

Plaintiff's Exhibit No. 1—(Continued)

12:01 A. M. Standard Time at the place of countersignature and shall terminate with the Policy.

ASSOCIATED INDEMNITY CORPORATION
L. S. MOORHEAD
President
C. C. ANDERSON
Secretary
ASSOCIATED FIRE & MARINE INSURANCE COMPANY
L. S. MOORHEAD
President
C. C. ANDERSON
Secretary

Policy dates from Dec. 14, 1939 to December 14, 1940. Countersigned at Everett, Washington on Dec. 14, 1939.

Agent
CLARK INVESTMENT CO.
Countersigned by
CLARK SALISBURY [48]

Copy

ASSOCIATED INDEMNITY CORPORATION

110—Truckmen—Hauling Under Contract

The named Insured having declared, as evidenced by the acceptance of this endorsement, that all of the commercial automobiles which he owns will be used during the policy period exclusively for

Plaintiff's Exhibit No. 1—(Continued)

commercial purposes in the business of W. P. A. and that the regular and frequent use of the commercial automobiles will be confined to the area within a fifty mile radius of the place of principal garaging of such automobiles as stated in the policy, it is agreed that no insurance for Bodily Injury Liability or for Property Damage Liability is afforded while any commercial automobile owned by the named Insured is used in the business of any person, firm or corporation other than the above named.

This Endorsement forms a part of Policy No. 253987 AF issued to David and Clarence Bunney by the Associated Indemnity Corporation of San Francisco, California, and is effective from Dec. 14, 1939, 12:01 A.M. Standard Time.

ASSOCIATED INDEMNITY CORPORATION
C. W. FELLOWS
President
C. C. ANDERSON
Secretary

Countersigned at Everett, Washington
CLARK INVESTMENT COMPANY
By CLARK SALISBURY
(Duly Authorized Representative)

Form 110.—Uniform Standard Automobile Endorsement.
4523-2 Tex. 5M 3-37 X. [49]

Plaintiff's Exhibit No. 1—(Continued)

ASSOCIATED INDEMNITY CORPORATION
and
ASSOCIATED FIRE & MARINE INSURANCE COMPANY

Copy

It is hereby understood and agreed that the truck insured hereunder will not be regularly or frequently operated into a higher rated territory than that shown in the policy.

Nothing herein contained shall be held to waive, alter, vary or extend any of the stipulations, agreements or limitations of this Policy, other than as above stated.

This Endorsement, issued by the Associated Indemnity Corporation and Associated Fire & Marine Insurance Company, when countersigned by a duly authorized official or representative, shall form a part of Policy No. 253987 AF issued to David Bunney and Clarence Bunney (Bunney Bros.) and shall become effective on the 14 day of December, 1939 at 12:01 A.M. Standard Time at the place of countersignature, and shall terminate with the Policy.

ASSOCIATED INDEMNITY
CORPORATION
L. S. MOORHEAD
President
C. C. ANDERSON
Secretary

Plaintiff's Exhibit No. 1—(Continued)

ASSOCIATED FIRE & MARINE INSURANCE COMPANY

L. S. MOORHEAD
President

C. C. ANDERSON
Secretary

Policy dates from Dec. 14, 1939 to Dec. 14, 1940.

Countersigned at Everett, Wash., on Dec. 14, 1939.

Agent

CLARK INVESTMENT CO.

Countersigned by

CLARK SALISBURY

Form 257-2AF 30M 6-39X [50]

Copy

ASSOCIATED INDEMNITY CORPORATION
COMPULSORY AUTOMOBILE INSURANCE
ENDORSEMENT

It is agreed that such insurance as is afforded by the policy for Bodily Injury Liability and for Property Damage Liability applies, subject to the following provisions:

1. Application of Insurance. The insurance applies to any automobile or trailer used by the named insured at any time during the policy period under the insured's certificate of public

Plaintiff's Exhibit No. 1—(Continued)

convenience and necessity or permit issued in compliance with any federal or state law, or any administrative rule adopted under such law, provided

(a) such automobile is not owned in full or in part by, or registered in the name of the named insured or a partner thereof if the named insured is a partnership or an executive officer thereof if the named insured is a corporation;

and does not apply to the liability of the owner of any hired automobile or trailer or to the liability of any employee of such owner.

2. Premium. The advance premium for the insurance, extended by this endorsement is Bodily Injury $ .65, Property Damage $ .45.

The earned premium for the insurance is based on the application of the classifications and rates for hired automobiles and trailers stated in the Automobile Casualty Manual in use by the company on the effective date of the policy, to the amount incurred by the named insured for the hire of such automobiles and trailers. The amount incurred shall include the wages of the named insured's chauffeurs employed in operating such automobiles and trailers, provided such vehicles are hired without chauffeurs in attendance.

The advance premium shall be the minimum premium for the insurance extended by this

Plaintiff's Exhibit No. 1—(Continued)

endorsement except that if the named insured incurs any expense for the hire of automobiles or trailers during the policy period, the minimum premium shall be Bodily Injury $15.00, Property Damage $9.00.

3. Records. The named insured shall maintain for each location where the automobiles or trailers are used a chronological record for the policy period with respect to such vehicles hired, stating (a) number and type; (b) periods of hire; (c) amount incurred; (d) names of parties from whom such vehicles are hired. The named insured shall send copies of such records to the company at the end of the policy period and at such times during the policy period as the company may direct.

4. Inspection. The company shall be permitted to examine and audit at all reasonable times during the policy period or within two years after the termination thereof the named insured's records so far as such records relate to the subject matter of this insurance. [51]

Nothing herein contained shall be held to waive, alter, vary or extend any of the conditions, stipulations, agreements or limitations of the Policy, other than as above stated.

This Endorsement, issued by the Associated Indemnity Corporation, when countersigned by its duly authorized official or representative, shall form a part of Policy No. 253987 AF issued to David

Plaintiff's Exhibit No. 1—(Continued)

Bunney and Clarence Bunney (Bunney Bros.) and shall become effective on the 14th day of December, 1939, at 12:01 A.M. Standard Time at the place of countersignature, and shall terminate with the Policy.

L. S. MOORHEAD,
President
C. C. ANDERSON,
Secretary

Countersigned at Everett, Washington, on Dec. 14th, 1939.

Agent
CLARK INVESTMENT CO.
Countersigned by
CLARK SALISBURY
Authorized for the purpose [52]

Copy

Associated Indemnity Corporation

DEPARTMENT OF PUBLIC SERVICE ENDORSEMENT

Washington

The policy to which this endorsement is attached is written in pursuance of and is to be construed in accordance with Chapter 184, Laws of 1935 of the State of Washington, and acts amendatory thereof and supplemental thereto, and the rules and regula-

Plaintiff's Exhibit No. 1—(Continued)

tions of the Department of Public Service of Washington adopted thereunder. The policy is to be filed with the state in accordance with said statute.

In consideration of the premium stated in the policy to which this endorsement is attached, the Company agrees to pay any final judgment for bodily injury, including death resulting therefrom, and/or damage to property (excluding cargo) of any person or persons other than the insured, caused by any and all motor vehicles as defined by said Chapter 184 of the Laws of 1935, covered by the terms of this policy and endorsement and operated by the insured pursuant to a permit issued by the Department of Public Service of Washington in accordance with said above named chapter, and acts amendatory thereof and supplemental thereto, within the limits set forth in the schedule of insurance hereinafter set forth; and further agrees that upon its failure to pay such final judgment said judgment creditor may maintain an action in any court of competent jurisdiction to compel such payment: Provided, However, That coverage shall not apply to any claims arising out of bodily injury, including death sustained by any person while riding in or upon, or entering or alighting from any automobile covered by the policy to which this endorsement is attached. Nothing contained in the policy or any endorsement thereon, nor the violation of any of the provisions thereof by the insured shall relieve the Company from liability hereunder or from the payment of such judgment.

Plaintiff's Exhibit No. 1—(Continued)

Schedule

(Unless the policy is written for higher limits, in which event the higher limits therein stated shall apply.)

On each motor vehicle used for the transportation of property, the limits of liability shall not exceed:

$5,000.00 for any recovery for bodily injury to or death of one person, and subject to the same limit for one person;

$10,000.00 for any recovery for bodily injury to or death of all persons as a result of one accident;

$5,000.00 for damage to property, excluding cargo, of any person other than the insured, provided that the total recovery for all persons for property damage resulting from one accident shall not exceed the sum of $5,000.00.

In consideration of the premium stated in the policy to which this endorsement is attached, the Company agrees to cover, in addition to the motor vehicles named in the policy, any additional, emergency or substituted motor vehicles for a period of [53] ten days from the date of beginning of use of such equipment: Provided, However, That in no event shall the automatic coverage extend to such additional, emergency or substituted motor vehicles if they are already covered by other valid insurance for limits of liability equal to or in excess of the

Plaintiff's Exhibit No. 1—(Continued)

limits required by said statute and the rules and regulations of the Department.

Where truck and trailer or trailers are used together they shall for the purpose of this endorsement be construed as one unit and liability therefor shall not exceed the limits of liability for one motor vehicle.

This endorsement shall not be construed as covering the legal liability of the insured for injuries to or death of employees of said insured engaged in the operation or maintenance of any automobile or any other employee of the insured arising out of or in the usual course of the trade, business, profession or occupation of the insured.

The policy to which this endorsement is attached shall not expire, nor shall cancellation take effect, until after fifteen (15) days' notice in writing by the Company shall have first been given to the Department of Public Service of Washington, at its office in Olympia, Washington, said fifteen days' notice to commence to run from the date notice is actually received by the Department.

Reimbursement Agreement. The insured agrees to reimburse the Company for any payment made by the Company on account of any accidents, claim or suit involving a breach of the terms of the policy and for any payment that the Company would not have been obligated to make under the provisions of the policy, except for the agreement contained in this endorsement.

Plaintiff's Exhibit No. 1—(Continued)

Nothing herein contained shall be held to waive, alter, vary or extend any of the conditions, stipulations, agreements or limitations of the Policy, other than as above stated.

This Endorsement, issued by the Associated Indemnity Corporation, when countersigned by its duly authorized official or representative, shall form a part of Policy No. 253987 AF issued to David Bunney and Clarence Bunney (Bunney Bros.) and shall become effective on the 14 day of December, 1939, at 12:01 A.M. Standard Time at the place of countersignature, and shall terminate with the Policy.

L. S. MOORHEAD
President
C. C. ANDERSON
Secretary

Countersigned at Everett, Washington, on December 14, 1939.

Sub-Agent or Broker
CLARK INVESTMENT CO.
Countersigned by
CLARK SALISBURY
(Resident Licensed Agent)

Form 4417 4 Wash. 1M 9-41 X [54]

Plaintiff's Exhibit No. 1—(Continued)

Associated Indemnity Corporation
Fire & Marine Insurance Company
(Emblem)
Head Offices—San Francisco
(Each a Stock Company)

(Copy) No. 253987 AF
Premium $23.10

DECLARATIONS

Item 1. Name of Insured—David Bunney and Clarence Bunney. The named Insured is (Individual, Corporation or Partnership).

Item 2. Address—124 So. 11th St., Mt. Vernon, Skagit County, Wash.

Item 3. The Automobile will be principally garaged and used in the above town, county and state, unless otherwise specified herein.

Item 4. The occupation of the named Insured is Truckers, employed by W. P. A.

Item 5. Policy Period: From Dec. 14, 12:01 A. M., 1939, to December 14, 1940, 12:01 A. M., standard time at the address of the named Insured as stated herein.

Item 6. Description of the Automobile and facts relating to its purchase.

Trade Name—Ford.

Year Model—1935.

No. of Cyls.—V8.

Type of Body (If truck, state tonnage)—Truck 1½ T Dump.

Plaintiff's Exhibit No. 1—(Continued)

Car Numbers (Give both numbers)—Mtr. BB18-1304989. Sr.....

List Price—

Actual Cost to Insured—

Purchased Month, Year—; New or Used—.

Item 7. The named insured is the sole owner of the Automobile, except as herein stated: no exceptions (title to insured truck is in the name of Bunney Bros.)

Item 8. The purposes for which the Automobile is to be used are Commercial only. (Specify whether "pleasure and business" or "commercial only" as defined in paragraph (a) and/or (b) following; or describe other uses.) May also be used for occasional personal and family purposes.

(a) The term "pleasure and business" is defined as personal, pleasure, family and business use. (b) The term "commercial only" is defined as the transportation or delivery of goods, merchandise or other materials, and uses incidental thereto, in direct connection with the named Insured's business occupation as expressed in Item 4. (c) Use of the Automobile for the purposes stated includes the loading and unloading thereof.

Item 9. No insurer has canceled any automobile insurance issued to the named Insured, nor declined to issue such insurance, during the past year, except as herein stated: no exceptions.

Item 10. Loss, if any, other than under Coverages A and B is payable to.....

Plaintiff's Exhibit No. 1—(Continued)

Item 11. The insurance afforded is only with respect to such and so many of the following Coverages as are indicated by specific premium charge or charges. The limit of the companies' liability against each such Coverage shall be as stated herein, subject to all of the terms of this policy having reference thereto.

Plaintiff's Exhibit No. 1—(Continued)

Company	Coverages Each as Defined on Page Two	Limits of Liability	Premiums
Associated Indemnity Corporation	A. Bodily Injury Liability	$ 5,000.00 each person, and, subject to that limit for each person, $10,000.00 each accident or a series of accidents arising from one and the same cause.	$13.00
	B. Property Damage Liability	$ 5,000.00 each accident or a series of accidents arising from one and the same cause.	$ 9.00
	C. Collision	Actual Cash Value less $ deductible	$ nil
	C-1. Convertible Collision—$..... Additional premium for full coverage payable upon reporting an accidental colision. Endorsement—State Compulsory	Actal Cash Value	$ nil $ 1.10
	Total Premium, Associated Indemnity Corporation		$23.10

Plaintiff's Exhibit No. 1—(Continued)

Company	Coverages Each as Defined on Page Two	Limits of Liability	Premiums
Associated Fire & Marine Insurance Company	D. Comprehensive, including Fire and Theft Excluding Collision or Upset	$	$ nil
	E. Fire, Lightning, and Transportation	$	$ nil
	F. Theft, Robbery, and Pilferage	$	$ nil
	G. Tornado, Cyclone, Windstorm, Hail, Earthquake, Explosion, and Water Damage	$	$ nil
	Endorsement		$ nil
	Total Premium, Associated Fire & Marine Insurance Company		$ nil
	Total Premium, Both Companies		$23.10

[Overprinted] : Speeimen Copy.

Plaintiff's Exhibit No. 1—(Continued)

Countersigned at Everett, Washington. Date Dec. 14, 1939.

Renewal of Policy No.—new.

Sub Agent or Broker
CLARK INVESTMENT CO.
By CLARK SALISBURY
Authorized Representative

[55]

ASSOCIATED INDEMNITY CORPORATION
and
ASSOCIATED FIRE & MARINE INSURANCE COMPANY OF SAN FRANCISCO, CALIFORNIA

(Each a Stock Insurance Company, herein called the Company)

Do Hereby Severally Agree with the Insured, named in the Declarations made a part hereof, in consideration of the payment of the premium and of the statements contained in the Declarations and subject to the limits of liability, exclusions, conditions, and other terms of this policy, provided (1) that the Associated Indemnity Corporation shall be the insurer with respect to such of Coverages A, B, C, and C-1 for which a premium is specified and charged in Item 11 of the Declarations, and no other, and (2) that the Associated Fire & Marine Insurance Company shall be the insurer with respect to such of Coverages D, E, F and G, for which a premium is specified and charged in Item 11 of the Declarations, and no other:

Plaintiff's Exhibit No. 1—(Continued)

INSURING AGREEMENTS

I. Coverage A—Bodily Injury Liability.

To pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance, or use of the Automobile.

Coverage B—Property Damage Liability.

To pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance, or use of the Automobile.

Coverage C—Collision.

To pay for direct loss consisting of damage to or destruction of the Automobile and its equipment caused by accidental collision with another object or by upset, but only for the amount of each separate loss, when determined, in excess of the deductible sum, if any, stated in Item 11 of the Declarations.

Plaintiff's Exhibit No. 1—(Continued)

Coverage C-1—Convertible Collision.

To pay for direct loss consisting of damage to or destruction of the Automobile and its equipment caused by accidental collision with another object or by upset, it being agreed that upon the occurrence of the first accidental collision or upset which is made the basis of a claim hereunder, the Insured shall pay to the company an additional premium in the amount stated in Item 11 of the Declarations for full coverage collision insurance, and the Insured shall give immediate notice in writing to the company of said collision or upset. It is further agreed that the company shall not be liable for [56] any collision or upset occurring before the date of the accidental collision reported as aforesaid or between such date and the payment of such additional premium.

Coverage D—Comprehensive, Including Fire & Theft (Coverages E and F)—Excluding Collision or Upset.

To pay for any loss of or damage to the Automobile and the equipment usually attached thereto, excluding, however, loss or damage caused by collision with another object or by upset. Breakage of glass and loss caused directly by tornado, cyclone, windstorm, hail, falling aircraft or parts thereof, and loss resulting from theft, earthquake, explosion, riot, riot attending a strike, insurrection, or civil commotion, shall not be deemed a loss caused by collision or upset.

Plaintiff's Exhibit No. 1—(Continued)

Coverage E—Fire, Lightning and Transportation.

To insure the insured named herein against direct loss consisting of damage to or destruction of the Automobile and its equipment caused by fire arising from any cause whatsoever; lightning; or the stranding, sinking, burning, collision, or derailment of any conveyance in or upon which the Automobile is being transported on land or water, including general average and salvage charges for which the Insured is legally liable.

Coverage F—Theft, Robbery, and Pilferage—Broad Form.

To insure the Insured named herein against direct loss consisting of the theft, robbery or pilferage of the Automobile and its equipment or damage to or destruction of such property directly resulting from such theft, robbery, or pilferage.

Coverage G—Tornado, Cyclone, Windstorm, Hail, Earthquake, Explosion, and Water Damage.

To insure the Insured named herein against direct loss consisting of damage to or destruction of the Automobile and its equipment caused by tornado, cyclone, windstorm, hail, earthquake, explosion or accidental and external discharge or leakage of water, excluding damage caused by rain, sleet, snow, flood, rupture of tires, or explosion within the combustion chamber of an internal combustion engine.

Plaintiff's Exhibit No. 1—(Continued)

II. Defense, Supplementary Payments.

It is further agreed that as respects insurance afforded by this policy under Coverages A and B the company shall, subject to the Exclusions and Conditions applicable to such coverages

(a) defend in his name and behalf any suit against the Insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent;

(b) pay (1) all premiums on release of attachment and appeal bonds for an amount not in excess of the applicable limit of liability of this policy; but without any obligation to apply for or furnish such bonds; (2) all costs taxed against the Insured in any such suit; (3) all expenses incurred by the company; (4) all interest accuring after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon; (5) any expense incurred by the Insured, in the event of bodily injury, for such immediate medical and surgical relief to others as shall be imperative at the time of accident. [57]

III. Investigation, Negotiation, Settlement.

The company shall have the right to make any investigation, negotiation, and settlement of any

Plaintiff's Exhibit No. 1—(Continued)

claim or suit as may be deemed expedient by the company.

In addition to the applicable limit of liability of this policy, the company agrees to pay the expenses incurred by the company under Insuring Agreements II and III.

IV. Definition of "Insured."

The unqualified word "Insured" wherever used in Coverages A and B and in other parts of this policy, when applicable to these coverages, includes not only the named Insured but also any person while using the Automobile and any person or organization legally responsible for the use thereof, provided that the declared and actual use of the Automobile is "pleasure and business" or "commercial only", each as defined herein, and provided further that the actual use is with the permission of the named Insured. The provisions of this paragraph do not apply:

(a) to any person or organization with respect to any loss against which he has other valid and collectible insurance;

(b) to any person or organization with respect to bodily injury to or death of any person who is a named Insured;

(c) to any person or organiaztion, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station, or public parking place,

Plaintiff's Exhibit No. 1—(Continued)

with respect to any accident arising out of the operation thereof;

(d) to any employee of any Insured with respect to any action brought against said employee because of bodily injury to or death of another employee of the same Insured injured in the course of such employment in an accident arising out of the maintenance or use of the Automobile in the business of such Insured.

V. Automatic Insurance for Newly Acquired Automobiles.

If the named Insured who is the owner of the Automobile acquires ownership of another automobile, such insurance as is afforded by this policy applies also to such other automobile as of the date of its delivery to him, subject to the following additional conditions: (1) if the company insures all automobiles owned by the named Insured at the date of such delivery, insurance applies to such other automobile if it is used for pleasure purposes or in the business of the named Insured as expressed in the Declarations, but only to the extent applicable to all such previously owned automobiles; (2) if the company does not insure all automobiles owned by the named Insured at the date of such delivery, insurance applies to such other automobile if it replaces an automobile described in this policy and may be classified for the purpose of use stated in this policy, but only to the extent

Plaintiff's Exhibit No. 1—(Continued)

applicable to the replaced automobile; (3) the insurance afforded by this policy automatically terminates upon the replaced automobile at the date of such delivery; and (4) this agreement does not apply (a) to any loss against which the named Insured has other valid and collectible insurance, nor (b) unless the named Insured notifies the company within 10 days following the date of delivery of such other automobile, nor (c) except during the policy period, but if the date of delivery of such other automobile is prior to the effective date of this policy the insurance applies as of the effective date of this policy, nor (d) unless the named Insured pays any additional premium required because of the application of this insurance to such other automobile. [58]

VI. Policy Period, Territory, Purpose of Use.

This policy applies only to accidents which occur and to direct losses to the property insured which are sustained during the policy period while the Automobile is within the United States in North America (exclusive of Alaska) or the dominion of Canada, or while on a coastwise vessel between ports within said territory, and is owned, maintained and used for the purposes stated as applicable thereto in the Declarations.

EXCLUSIONS

This Policy Does Not Apply:

1. under any of the above Coverages, nor under Insuring Agreement II, while the automobile is

Plaintiff's Exhibit No. 1—(Continued)

used in the business of demonstrating or testing, or as a public or livery conveyance, or while carrying any person for a consideration, or while rented under *under* contract or leased, unless such use is specifically declared and described in this policy and premium charged therefor or while being operated by any person in any prearranged race or competitive speed test;

2. under any of the above Coverages nor under Insuring Agreement II, to any liability assumed by the Insured under any contract or agreement; or to any accident which occurs after the transfer during the policy period of the interest of the named Insured in the automobile, without the written consent of the company;

3. under Coverages A and B, nor under Insuring Agreement II, while the Automobile is being used for the towing of any trailer not covered by like insurance in the company; or while any trailer covered by this policy is used with any automobile not covered by like insurance in the company;

4. under Coverages A, B, C and C-1, nor under Insuring Agreement II, while the Automobile is operated by any person under the age of fourteen years; or by any person in violation of any state, federal or provincial law as to age applicable to such person or to his occupation;

5. under Coverage A, nor under Insuring Agreement II, to bodily injury to or death of any employee of any Insured while engaged in the busi-

Plaintiff's Exhibit No. 1—(Continued)

ness of any Insured, other than domestic employment, or in the operation, maintenance or repair of the Automobile; or to any obligation for which any Insured may be held liable under any workmen's compensation law;

6. under Coverage B, nor under Insuring Agreement II, to property owned by, rented to, leased to, in charge of, or transported by the Insured;

7. under Coverages C, C-1 and G, to loss caused directly or indirectly by fire, theft, robbery or pilferage, or consisting of injury to any tire unless caused by an accidental collision or upset of the Automobile which causes other injury to the Automobile;

8. under Coverages C, C-1, E, F and G, to loss caused directly or indirectly by invasion, insurrection, riot, war, civil war or commotion, military, naval or usurped power, or by order of any civil authority;

9. under Coverages C, C-1, D, E, F and G, to loss consisting of damage to or theft of robes, wearing apparel, or personal effects;

10. under Coverages C, C-1, D, E, F and G, except as to any lien, mortgage or other encumbrance specifically set forth and described in Item 7 of the Declarations, and unless otherwise provided by agreement in writing added hereto, if the interest of the Insured in the Automobile be or become other than unconditional and sole ownership or if the Automobile [59] has ever been stolen

Plaintiff's Exhibit No. 1—(Continued)

or unlawfully taken prior to the issuance of this policy and not returned to the lawful owner prior to the issuance of this policy, or in case of transfer or of termination of the interest of the Insured other than by death of the Insured, or in case of any change in the nature of the insurable interest of the Insured in the Automobile either by sale or otherwise, or if this policy or any part thereof or any cause of action thereunder shall be assigned before or after loss or damage;

11. under Coverage F, to loss from theft, robbery or pilferage by any person or persons of the Insured's household or in the Insured's service or employment, whether the theft, robbery or pilferage occurs during the hours of such service or employment or not; or by any person or agent thereof, or by the agent of any firm or corporation to which person, firm or corporation the Insured or any one acting under expressed or implied authority voluntarily parts with title or possession, whether or not induced so to do by any fraudulent scheme, trick, device or false pretense;

12. under Coverages D and F, to loss from the wrongful conversion, embezzlement or secretion by a mortgagor, vendee, lessee or other person in lawful possession of the insured property under a mortgage, conditional sale, lease or other contract or agreement, whether written or verbal; or to loss of tools, or repair equipment by theft, robbery, or pilferage unless the entire automobile is stolen;

Plaintiff's Exhibit No. 1—(Continued)

13. under Coverages C, C-1, D, E, F, and G, while the Automobile is being used in ay illicit or prohibited trade or transportation;

14. under Coverage D, to loss caused directly or indirectly by war or civil war, invasion, military, naval or usurped power, or by order of any civil authority; or to wear and tear, mechanical or electrical breakdowns, failures, breakages or freezing;

15. under Coverages C, C-1, and D, to damage to tires, excepting where such tire damage shall be directly caused by, and result from other loss or damage covered by this policy.

CONDITIONS APPLICABLE TO ALL COVERAGES

1. Automobile Defined. Two or More Automobiles. Except where specifically stated to the contrary, the word "Automobile" wherever used in this policy shall mean the motor vehicle, trailer, or semi-trailer described herein; and the word "trailer" shall include semi-trailer. When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each, but as respects limits of bodily injury liability and property damage liability a motor vehicle and a trailer or trailers attached thereto shall be held to be one automobile.

2. Assistance and Cooperation of the Insured. The Insured shall cooperate with the company and, upon the company's request, shall attend hearings

Plaintiff's Exhibit No. 1—(Continued)

and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses, in the conduct of suits, and, in the event of theft, in the recovery of the Automobile by means of replevin proceedings or otherwise; and the company shall reimburse the Insured for any expense, other than loss of earnings, incurred at the company's request. The Insured [60] shall not, except at his own cost, voluntarily make any payment, assume any obligation, or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the accident. Failure to cooperate in any of the foregoing respects shall render this policy null and void.

3. Subrogation. In the event of any payment under this policy, the company shall be subrogated to all the Insured's rights of recovery therefor, and the Insured shall execute all papers requested and shall do everything that may be necessary to secure such rights.

4. Changes. No notice to any agent or knowledge possessed by any agent or by any other person shall be held to effect a waiver or change in any part of this policy nor estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part hereof, signed by the President and the Secretary and countersigned by a duly authorized representative of the company.

Plaintiff's Exhibit No. 1—(Continued)

5. Assignment. No assignment of interest under this policy shall bind the company until its consent is endorsed hereon; if, however, the named Insured shall die or be adjudged bankrupt or insolvent within the policy period, this policy, unless canceled, shall, if written notice be given to the company within 30 days after the date of such death or adjudication, cover (1) the named Insured's legal representative as the named Insured, and (2) subject otherwise to the provisions of Paragraph IV, and only as respects Coverages A and B, any person having proper temporary custody of the Automobile as an Insured until the appointment and qualification of such legal representative, but, in no event, for a period of more than 30 days after the date of such death or adjudication.

6. Cancellation. This policy may be cancelled by the named Insured by surrender of the policy or by mailing written notice to the company stating when thereafter such cancellation shall be effective in which case the company shall, upon demand, refund the excess of premium paid by such Insured above the customary short rate premium for the expired term. This policy may be canceled by the company by mailing written notice to the named Insured at the address shown in this policy stating when not less than 5 days thereafter such cancellation shall be effective, and, upon demand, the company shall refund the excess of premium paid by such Insured above the pro rata premium for the

Plaintiff's Exhibit No. 1—(Continued)

expired term. The mailing of notice as aforesaid shall be sufficient proof of notice, and the insurance under this policy as aforesaid shall end on the effective date and hour of cancellation stated in the notice. Delivery of such written notice either by the named Insured or by the company shall be equivalent to mailing. The company's check or the check of its representative similarly mailed or delivered shall be a sufficient tender of any refund of premium due to the named Insured. If required by statute in the state where this policy is issued, refund of premium due to the named Insured shall be tendered with notice of cancellation when the policy is canceled by the company, and refund of premium due to the named Insured shall be made upon computation thereof when the policy is canceled by the named Insured.

7. Declarations. By acceptance of this policy, the named Insured agrees that the statements in the Declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations, and that this policy embodies all agreements existing be- [61] tween himself and the company or any of its agents relating to this insurance. This entire policy shall be void in case of fraud, concealment, misrepresentation or false swearing by the Insured touching any matter relating to this insurance, or the subject thereof, whether before or after loss.

8. Conflicting Statutory Provisions. If any pro-

Plaintiff's Exhibit No. 1—(Continued)

vision of this policy conflicts with any law applicable hereto, such provision shall be inoperative in the jurisdiction in which it conflicts, to the extent of such conflict; and any provision required by law applicable hereto shall be deemed included herein.

APPLICABLE ONLY TO COVERAGES A AND B

9. Notice of Accident.—Claim or Suit. Upon the occurrence of an accident, written notice shall be given by or on behalf of the Insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the Insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the name and address of the injured and of any available witnesses. If claim is made or suit is brought against the Insured, the Insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

10. Action Against Company. No action shall lie against the company unless, as a condition precedent thereto, the Insured shall have fully complied with all the conditions hereof nor until the amount of the Insured's obligation to pay shall have been determined either by final judgment against the Insured after actual trial or by written agreement of the Insured, the claimant, and the company, nor

Plaintiff's Exhibit No. 1—(Continued)

in either event unless suit is instituted within two years and one day after the date of such judgment or written agreement.

Any person or his legal representative who has secured such judgment or written agreement shall thereafter be entitled to recover under the terms of this policy in the same manner and to the same extent as the Insured. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the Insured to determine the Insured's liability.

Bankruptcy or insolvency of the Insured shall not relieve the company of any of its obligations hereunder.

11. Other Insurance. If the named Insured has other insurance against a loss covered by this policy, the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability expressed in the Declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

12. Limits of Liability.—Coverage A. The limit of bodily injury liability expressed in the Declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury to or death of one person in any one accident; the limit of such liability ex-

Plaintiff's Exhibit No. 1—(Continued)

pressed in the Declarations as applicable to "each accident" is, subject to the above provision respecting each person, the total limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury to or death of two or more persons in any one accident.

13. Limits of Liability. The inclusion herein of more than one Insured shall not operate to increase the limits of the company's liability. [62]

14. Financial Responsibility Laws. Any insurance provided by this policy for bodily injury liability or property damage liability shall conform to the provisions of the motor vehicle financial responsibility law of any state or province which shall be applicable with respect to any such liability arising from the maintenance, use or operation of the Automobile during the policy period, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The Insured agrees to reimburse the company for any payment made by the company on account of any accident, claim, or suit involving a breach of the terms of this policy and for any payment the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this paragraph.

Plaintiff's Exhibit No. 1—(Continued)

APPLICABLE ONLY TO COVERAGES C, C-1, D, E, F AND G.

15. Notice of Loss. In the event of loss covered hereunder, written notice shall be given by or on behalf of the Insured to the company or any of its authorized agents, as soon as practicable, and in the event of theft, robbery, or pilferage the Insured shall also give immediate notice thereof to the police authorities.

16. Proof of Loss—Coverages D, E, F and G. Within sixty (60) days after loss, unless such time is extended in writing by the company, the Insured shall render a statement to the company signed and sworn to by the Insured stating the place, time and cause of the loss, the interest of the Insured and of all others in the Automobile, the sound value thereof and the amount of loss, all encumbrances thereon, and all other insurance, whether valid and collectible or not, covering said Automobile; and the Insured as often as required, shall exhibit to any person designated by the company all that remains of the automobile and submit to examinations under oath by any person named by the company and subscribe the same, and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by the company or its representative and shall permit extracts and copies

Plaintiff's Exhibit No. 1—(Continued)

thereof to be made. Failure to comply in any of the foregoing respects shall render this policy null and void.

17. Protection of Salvage. In the event of any loss, whether insured against hereunder or not, the Insured shall protect the Automobile from other or further loss, and any such other or further loss due directly or indirectly to the Insured's failure to so protect shall not be recoverable under this policy. Any act of the Insured or the company or its agents in recovering, saving, or preserving the Automobile shall be considered as done for the benefit of all concerned and without prejudice to the rights of either party, and where the loss suffered constitutes a claim under this policy all reasonable expenses thus incurred shall also constitute a claim provided, however, that the company shall not be responsible for the payment of a reward offered for the recovery of the Automobile unless authorized by the company.

18. Limit of Liability. The company's limit of liability with respect to the Automobile and its equipment shall be the actual cash value of the property upon which loss is claimed at the time the loss occurs, or the cost of its suitable repair or replacement not in excess of such cash value, and loss shall be ascertained or estimated accordingly but shall, in no event, exceed the limit of liability, [63] if any, stated in the Declarations; such ascertainment or estimate shall be made by the Insured and

Plaintiff's Exhibit No. 1—(Continued)

the company or if they differ then by appraisal as herein provided.

19. Appraisal, Repair, Replacement, Abandonment. In case the Insured and the company shall fail to agree as to the amount of loss or damage, the company shall within thirty (*3*) days of the making of the proof of loss, and the Insured within sixty (60) days of such date, on the written demand of either, select a competent and disinterested appraiser. These appraisers shall first select a competent and disinterested umpire; and failing for fifteen (15) days to agree upon such umpire, then, on request of the Insured or the company, such umpire shall be selected by a judge of a court of record in the county and state in which the appraisal is pending. The appraisers shall then appraise the loss and damage, stating separately sound value and loss or damage; and failing to agree, shall submit their differences only, to the umpire. An award in writing of any two, when filed with this company, shall determine the amount of sound value and loss or damage. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

The Insured shall give the company reasonable opportunity to examine any property insured hereunder upon which loss is claimed before repairs are undertaken or physical evidence of loss removed.

The company shall not be held to have waived

Plaintiff's Exhibit No. 1—(Continued)

any of the terms of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination provided for herein.

The company may, at its option, either repair or replace any part or all of the insured property upon which loss is claimed with other of like kind and quality or pay to the Insured in money the full amount of such loss as determined in accordance with the provisions of this policy, subject, however, to such deduction, if any, as may be applicable thereto. There can be no abandonment to the company of any property insured hereunder.

20. Return of Stolen Property. Coverages D and F. With respect to loss under Coverages D and F the company shall have the right to return the insured property to the Insured with compensation for physical damage at any time before payment of loss.

21. Payment of Loss. Coverages D, E, F and G. Any loss or damage covered hereunder shall in no event become payable until thirty (30) days after the notice, ascertainment, estimate and verified proof of loss or damage herein required have been received by this company, and if appraisal is demanded, then not until thirty (30) days after the award of the appraisers.

22. Other Insurance. No recovery shall be had under this policy if at the time a loss occurs there be any other insurance, whether such other insur-

Plaintiff's Exhibit No. 1—(Continued)

ance be valid and collectible or not, covering such loss, which would attach if this insurance had not been effected.

23. Loss For Which Bailee For Hire Is Liable. The company is not liable for damage to any property while in the possession of a bailee for hire under a contract, stipulation or assignment purporting to make this insurance available to such bailee. Where a bailee may be liable for damage which would otherwise be covered hereunder, the company will lend the named Insured the amount of such damage. Such loan shall not affect the company's liability and shall be repaid to the extent of the amount collected, by or for the named Insured from the bailee less the expense of collection. [64]

24. Action Against Company. No action shall lie against the company for recovery under this policy unless the Insured shall have complied with all requirements hereof, nor unless commenced within twelve (12) months from the date of loss.

In Witness Whereof, Associated Indemnity Corporation has caused this policy, with respect to Coverages A, B, C and C-1 and such other parts of the policy as are applicable thereto, to be signed by its President and Secretary, but it shall not be binding until it has been countersigned by an authorized official or representative of the company.

L. S. MOORHEAD
President
C. C. ANDERSON
Secretary

Plaintiff's Exhibit No. 1—(Continued)

In Witness Whereof, Associated Fire & Marine Insurance Company has caused this policy, with respect to Coverages D, E, F and G and such other parts of the policy as are applicable thereto, to be signed by its President and Secretary, but it shall not be binding upon the company until it has been countersigned by a duly authorized official or representative of the company.

L. S. MOORHEAD
President
C. C. ANDERSON
Secretary

COMBINATION AUTOMOBILE POLICY

253987 AF

ASSOCIATED INDEMNITY CORPORATION

ASSOCIATED FIRE & MARINE INSURANCE COMPANY

Head Office: San Francisco

Issued to
David Bunney and Clarence Bunney
Expires December 14, 1940.

Please Read Your Policy.

[Overprinted]: Specimen Copy.

Received Sep. 18, 1942. Dept. Pub. Serv. [65]

Plaintiff's Exhibit No. 1—(Continued)

CERTIFICATE

State of Washington,
County of Thurston—ss.

I hereby certify that the foregoing and attached documents are full true and correct copies of original Common Carrier Permit No. 7034 issued to David and Clarence Bunney, doing business as Bunney Bros., which was in full force and effect on January 5, 1940; liability and property damage insurance policy No. 253987 AF, issued by Associated Indemnity Corporation to David Bunney and Clarence Bunney, which policy was in full force and effect on January 5, 1940, covering equipment operated by David and Clarence Bunney under Common Carrier Permit No. 7034, now on file in the office of the Department of Public Service of Washington at Olympia.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Department of Public Service of Washington, this 23rd day of September, 1942.

A. E. ROTCHFORD
Secretary of the Department of Public Service of Washington

[Seal]

S. F. No. 3271-8-4-41-1M. 23075. [66]

PLAINTIFF'S EXHIBIT No. 2

RULES AND REGULATIONS

Time Schedule No. 2
Cancels
Time Schedule No. 1
(Permit No. 88)

TIME SCHEDULE
of
WALTER A. KEYS

Operating under Trade Name of
Wenatchee-Cashmere Freight Line

MOTOR VEHICLE FREIGHT SERVICE

Between
Wenatchee, Wash. and Cashmere, Wash.
with Terminal Depots at
123 So. Wenatchee Avenue, Wenatchee;
Butler's Jewelry Store, Cashmere,
via the following route:

West on Wenatchee Avenue to city limits; thence west on Sunset Highway through Monitor to Terminal at Cashmere.

Effective June 23, 1929.
Issued June 8, 1929.
Issued to Walter A. Keys.
Title, Owner and Manager.
Street Address, 123 S. Wenatchee Ave.
City and State, Wenatchee, Wash.

Plaintiff's Exhibit No. 2—(Continued)

Leave Wenatchee Read Down			Mileage From Wenatchee to		Leave Cashmere Read Up		
Daily	Sunday only	Daily Ex Sun			Daily	Sunday only	Daily Ex Sun
AM	PM	PM			AM	PM	PM
Lv 11:00	1:30	5:30	0.0	Wenatchee	Ar 10:40	1:10	5:10
" 11:08	1:38	5:38	2.7	Wen Riv Br	" 10:32	1:02	5:02
" 11:09	1:39	5:39	3.3	Olds Corner	" 10:31	1:01	5:01
" 11:12	1:42	5:42	4.4	Sunnyslope	" 10:29	12:59	4:59
" 11:14	1:44	5:44	4.9	Lovells Corner	" 10:27	12:57	4:57
" 11:16	1:46	5:46	6.0	Burkeys Corner	" 10:22	12:52	4:52
" 11:20	1:50	5:50	7.0	Crows Corner	" 10:19	12:49	4:50
" 11:23	1:53	5:53	8.1	Monitor P. O.	" 10:16	12:46	4:46
" 11:26	1:56	5:56	8.7	Blue Nose Cr	" 10:14	12:44	4:44
" 11:29	1:59	5:59	9.3	Red Bridge	" 10:11	12:41	4:41
" 11:34	2:04	6:04	10.5	Hughes Corner	" 10:07	12:37	4:37
" 11:40	2:10	6:10	12.5	Cashmere	" 10:00	12:30	4:30

Plaintiff's Exhibit No. 2—(Continued)

Explanatory Notes:

Contract Carriers—Subletting Prohibited

Rule 27. No contract carrier shall sublet any hauling under any of his contracts, and in the event he is unable to meet the demands of the shipper for transportation of goods under any contract because of lack of facilities or otherwise, arrangements for the transportation of such commodities must be made by the shipper. Carriers subject to the provisions of this rule shall not act as agents of the shipper in such cases. (See Rule 3½). [67]

Common Carriers—Reserve Equipment

Rule 28. Every common carrier shall have sufficient standby equipment to meet all reasonable demands upon him for transportation on occasions when equipment may be withdrawn for ordinary repairs, including such equipment as may be needed for auxiliary or substitution purposes.

Equipment—Complete List on File

Rule 29. Failure of a permit holder to keep on file with the Department at all times a complete list of all equipment used or operated by him under his permit and to keep the same covered by insurance as provided by law shall be grounds for immediate cancellation of his permit. (See Rule 44.)

Insurance—Requirements Of

Rule 30. At the time of filing application for a permit every common carrier, contract carrier and

Plaintiff's Exhibit No. 2—(Continued)

special carrier shall file with the Department liability and property damage insurance written by a company authorized to write such insurance in the State of Washington, covering each motor vehicle (as defined by Section 2, Chapter 184, Laws of 1935) used or to be used under the permit granted, in the amount of not less than five thousand ($5,000) dollars for recovery for personal injury by one person and not less than ten thousand ($10,000) dollars for all persons receiving personal injury by reason of one act of negligence, and not less than five thousand ($5,000) dollars for damage to property, excluding cargo, of any person other than the assured.

The Department may provide for increased or reduced limits in such cases as it may deem in the public interest.

Insurance—Endorsements—Binders

Rule 31. Endorsements, new insurance policies and binders renewing policies shall be filed with the Department not less than ten (10) days prior to termination date of policies then on file in order that they may be in full force and effect on date of expiration of the policies or bonds then in effect.

Rule 32. Repealed.

Insurance—Cancellation

Rule 33. All insurance policies filed with the Department as required by Chapter 184, Laws of 1935, shall provide that the same shall continue in

Plaintiff's Exhibit No. 2—(Continued)

full force and effect unless and until cancelled by at least fifteen (15) days' written notice served on the insured and the Department of Public Service by the insurance company, the said fifteen (15) days' notice to commence to run from the date notice is actually received by the Department.

Policies written to cover temporary permits must be written for a period of not less than the term of the permit, and shall be accompanied by a receipt for full payment of the premium.

All policies filed shall become a part of the permanent records of the Department. [68]

Insurance—Endorsement and Form Of

Rule 34. All insurance policies filed covering liability and property damage shall carry an endorsement in form provided by the Department as follows:

Endorsement

The policy to which this endorsement is attached is written in pursuance of and is to be construed in accordance with Chapter 184, Laws of 1935, of the State of Washington, and acts amendatory thereof and supplemental thereto, and the rules and regulations of the Department of Public Service of Washington adopted thereunder. The policy is to be filed with the state in accordance with said statute.

In consideration of the premium stated in the policy to which this endorsement is attached, the Company agrees to pay any final judgment for personal injury, including death resulting therefrom,

Plaintiff's Exhibit No. 2—(Continued)

and/or damage to property (excluding cargo) of any person or persons other than the assured, caused by any and all motor vehicles as defined by said Chapter 184 of the Laws of 1935, covered by the terms of this policy and endorsement and operated by the assured pursuant to a permit issued by the Department of Public Service of Washington in accordance with said above named chapter, and acts amendatory thereof and supplemental thereto, within the limits set forth in the schedule of insurance hereinafter set forth; and further agrees that upon its failure to pay such final judgment such judgment creditor may maintain an action in any court of competent jurisdiction to compel such payment. Nothing contained in the policy or any endorsement thereon, nor the violation of any of the provisions thereof by the assured shall relieve the Company from liability hereunder or from the payment of such judgment.

Schedule

(Unless the policy is written for higher limits, in which event the higher limits therein stated shall apply.)

On each motor vehicle used for the transportation of property, the limits of liability shall not exceed:

$5,000.00 for any recovery for personal injury to or death of one person, and subject to the same limits for one person;

Plaintiff's Exhibit No. 2—(Continued)

$10,000.00 for any recovery for injury to or death of all persons as a result of one accident;

$5,000.00 for damage to property, excluding cargo, of any person other than the assured, provided that the total recovery for all persons for property damage resulting from one accident shall not exceed the sum of $5,000.00.

In consideration of the premium stated in the policy to which this endorsement is attached, the Company agrees to cover, in addition to the motor vehicles named in the policy, any additional, emergency or substituted motor vehicles for a period of ten days from the date of beginning of use of such equipment; Provided, however, That in no event shall the automatic coverage extend to such additional, emergency or substituted motor vehicles if they are already covered by other valid insurance for limits of liability equal to or in excess of the limits required by said statute and the rules and regulations of the Department.

Where truck and trailer or trailers are used together [69] they shall for the purpose of this endorsement be construed as one unit and liability therefor shall not exceed the limits of liability for one motor vehicle.

This endorsement shall not be construed as covering the legal liability of the assured for injuries to or death of employees of said assured engaged in the operation or maintenance of any automobile

Plaintiff's Exhibit No. 2—(Continued)

or any other employee of the assured arising out of or in the usual course of the trade, business, profession or occupation of the assured.

The policy to which this endorsement is attached shall not expire, nor shall cancellation take effect, until after fifteen (15) days' notice in writing by the company shall have first been given to the Department of Public Service of Washington, at its office in Olympia, Washington, said fifteen days' notice to commence to run from the date notice is actually received by the Department.

Insurance—Carrier Shall Not Misrepresent

Rule 35. No common carrier shall advertise or represent to the public that he is an "Insured Carrier" unless his equipment is covered by property damage, public liability and cargo insurance.

Broker—Forwarder—Common Carrier C.O.D. Shipment—Bonds

Rule 35½. Each broker or forwarder shall file with the Department and keep in effect a surety bond, or deposit satisfactory security in a sum to be determined by the Department, to be conditioned upon such broker or forwarder making compensation to shippers or consignees for all moneys belonging to shippers or consignees coming into the possession of such broker or forwarder in connection with his transportation service.

Every common carrier handling C.O.D. shipments shall be required to file a bond or deposit security

Plaintiff's Exhibit No. 2—(Continued)

satisfactory to the Department, conditioned upon such carrier making compensation to shippers and consignees for all moneys belonging to shippers and consignees and coming into the possession of such carrier in connection with his transportation service.

The amount or penalty of such security or bond shall be at least five hundred ($500) dollars; and for carriers having annual gross revenues of twenty thousand dollars and less than fifty thousand dollars, a bond of one thousand ($1,000) dollars; for carriers having annual gross revenues of fifty thousand dollars and less than seventy-five thousand dollars, a bond of two thousand ($2,000) dollars; and for carriers having gross revenues of seventy-five thousand dollars or more, a bond of twenty-five hundred ($2,500) dollars: Provided, That different amounts may be prescribed by the Department in any case where it deems such action advisable or necessary. Such bond shall be terminable on not less than fifteen days' notice to the Department.

No common carrier shall advertise or represent to the public that he is a bonded carrier unless he files a bond with the Department in accordance with this rule.

Accounts—Uniform Classification Adopted

Rule 36. The "Uniform Classification of Accounts and Statistics" hereinafter set forth on pages

Plaintiff's Exhibit No. 2—(Continued)

51 to 67, [70] inclusive adopted by the Department, issue of May 1st, effective May 1, 1935, entitled:

"Uniform Classification of Accounts and Statistics for Motor Freight Carriers,"

is hereby prescribed for the use of common, contract and special carriers.

Accounts—Kept in Accordance With Classification

Rule 37. Each common carrier and special carrier must secure from the Department a copy of the "Uniform Classification of Accounts and Statistics" adopted by Rule 36 hereof, applicable to his business and keep his * * * [71]

Before the Department of Public Service of Washington

In re Amendment to Rules 33 and 34 of the Rules and Regulations Covering Motor Freight Carriers.

GENERAL ORDER M. V. No. 68
AMENDING RULES 33 and 34.

Under the provisions of Chapter 184 of the Laws of 1935 as amended, and in the exercise of the general powers therein conferred,

Order

It Is Hereby Ordered That Rule 33 of the Rules and Regulations Governing Motor Freight Carriers, adopted by General Order M. V. No. 55, dated

Plaintiff's Exhibit No. 2—(Continued)

November 1, 1935, be and the same is hereby amended to read as follows:

Rule 33. All insurance policies filed with the Department in accordance with Chapter 184 of the laws of 1935 as amended, shall provide that the same shall continue in full force and effect unless and until cancelled by not less than fifteen (15) days' written notice served on the insured and the Department of Public Service by the insurance company, the said fifteen (15) days' notice to commence to run from the date notice is actually received by the Department. All notices of cancellation or expiration served on the Department shall be in duplicate on forms furnished by the Department, the duplicate to be returned to the insurance company as acknowledgment.

Policies written to cover temporary permits must be written for a period of not less than the term of the permit, and shall be accompanied by a receipt for full payment of the premium.

All policies filed shall become a part of the permanent records of the Department.

It Is Further Ordered That Rule 34 of the Rules and Regulations Governing Motor Freight Carriers, adopted by General Order M. V. No. 55, dated November 1, 1935 as amended by General Order M. V. No. 66, dated March 29, 1939, be and the same is hereby amended to read as follows:

Rule 34. All insurance policies filed with the Department, covering liability and property damage,

Plaintiff's Exhibit No. 2—(Continued)

shall carry an endorsement in the form provided by the Department as follows:

Endorsement

The policy to which this endorsement is attached is written in pursuance of and is to be con*t*rued in accordance with Chapter 184, Laws of 1935 of the State of Washington, and acts amendatory thereof and supplemental thereto, and the rules and regulations of the Department [72] of Public Service of Washington adopted thereunder. The policy is to be filed with the state in accordance with said statute.

In consideration of the premium stated in the policy to which this endorsement is attached, the Company agrees to pay any final judgment for bodily injury, including death resulting therefrom, and/or damage to property (excluding cargo) of any person or persons other than the assured, caused by any and all motor vehicles as defined by said Chapter 184 of the Laws of 1935, covered by the terms of this policy and endorsement and operated by the assured pursuant to a permit issued by the Department of Public Service of Washington in accordance with said above named chapter, and acts amendatory thereof and supplemental thereto, within the limits set forth in the schedule of insurance hereinafter set forth; and further agrees that upon its failure to pay such final judgment said judgment creditor may maintain an action in any court of competent jurisdiction to compel such pay-

Plaintiff's Exhibit No. 2—(Continued)

ment; Provided, However, That coverage shall not apply to any claims arising out of bodily injury, including death sustained by any person while riding in or upon, or entering or alighting from any automobile covered by the policy to which this endorsement is attached. Nothing contained in the policy or any endorsements thereon, nor the violation of any of the provisions thereof by the assured shall relieve the Company from liability hereunder or from the payment of such judgment.

Schedule

(Unless the policy is written for higher limits, in which event the higher limits therein stated shall apply.)

On each motor vehicle used for the transportation of property, the limits of liability shall not exceed:

$5,000.00 for any recovery for bodily injury to or death of one person, and subject to the same limit for one person;

$10,000.00 for any recovery for bodily injury to or death of all persons as a result of one accident;

$5,000.00 for damage to property, excluding cargo, of any person other than the assured, provided that the total recovery for all persons for property damage resulting from one accident shall not exceed the sum of $5,000.00.

In consideration of the premium stated in the policy to which this endorsement is attached, the

Plaintiff's Exhibit No. 2—(Continued)

Company agrees to cover, in addition to the motor vehicles named in the policy, any additional, emergency or substituted motor vehicles for a period of ten days from the date of beginning of use of such equipment; Provided, However, That in no event shall the automatic coverage extend to such additional, emergency or substituted motor vehicles if they are already covered by other valid insurance for limits of liability equal to or in excess of the limits required by said statute and the rules and regulations of the Department.

Where truck and trailer or trailers are used together they shall for the purpose of this endorsement be [73] construed as one unit and liability therefor shall not exceed the limits of liability for one motor vehicle.

This endorsement shall not be construed as covering the legal liability of the assured for injuries to or death of employees of said assured engaged in the operation or maintenance of any automobile or any other employee of the assured arising out of or in the usual course of the trade, business, profession or occupation of the assured.

The policy to which this endorsement is attached shall not expire, nor shall cancellation take effect, until after fifteen (15) days' notice in writing by the company shall have first been given to the Department of Public Service of Washington, at its office in Olympia, Washington, said fifteen days' notice to commence to run from the date notice is actually received by the Department.

Plaintiff's Exhibit No. 2—(Continued)

Reimbursement Agreement. The insured agrees to reimburse the company for any payment made by the company on account of any accidents, claim or suit involving a breach of the terms of the policy and for any payment that the company would not have been obligated to make under the provisions of the policy, except for the agreement contained in this endorsement.

Attached to and forming a part of Policy No. ..... issued by..... to .....

Dated at Olympia, Washington, June 8, 1939.

DEPARTMENT OF PUBLIC SERVICE OF WASHINGTON

/s/ RALPH J. BENJAMIN
Supervisor of Transportation

WWD:gr [74]

PLAINTIFF'S EXHIBIT No. 3

In the Superior Court of the State of Washington
In and for the County of Skagit

No. 16431

ARTHUR MILES as guardian ad litem for WILMER BUNNEY, a minor, and individually,
Plaintiff,

vs.

DAVID BUNNEY and CLARENCE BUNNEY, co-partners doing business as BUNNEY BROS.; and POUND MOTOR COMPANY, a corporation, the legal name of which is now WATKINS MOTOR COMPANY, a corporation,
Defendants.

JUDGMENT

This cause having come on regularly for trial before a jury on November 4, 1940, plaintiff being represented by his attorneys, Welts & Welts; the defendants, David Bunney and Clarence Bunney, copartners doing business as Bunney Bros., having defaulted; the defendant Pound Motor Company, a corporation, now Watkins Motor Company, a corporation, appearing by its counsel, Shank, Belt, Rode & Cook; and all parties having stated that they were ready for trial; thereupon a jury was duly impanelled and sworn to try said cause, and a

trial was had; plaintiff and defendants having introduced their evidence and rested, then argument of respective counsel having been made; the court before argument having regularly instructed the jury, and the jury having retired to consider its verdict, thereafter on the 6th day of November, said jury having agreed upon a verdict and returned the same in to court, and said jury having been polled and it appearing therefrom that ten of said jurors announced in open court that this was the verdict, the verdict having been received by the court and filed by the clerk thereof, which said verdict, omitting the formal part, read and reads as follows:

> We, the jury, duly impanelled and sworn to try the above entitled cause, do find in favor of the plaintiff and against all of the defendants and do assess plaintiff's [75] damages as follows:
>
> General damages $3,000.00
> Special damages 780.20
>
> Dated this 6th day of November, 1940.
>
> MYRTLE McCOMAS
> Foreman

Thereafter, the defendant, Watkins Motor Company, a corporation, having filed motions for judgment notwithstanding verdict and for a new trial, said motions having come on regularly to be heard before this court and the court having heard the arguments of respective counsel thereon and duly considered said motions and each of them and found

that said motions and each of them should be denied, and an order having been entered by this court denying said motions and each of them and it appearing to the court that judgment should be entered in accordance with said verdict in favor of the plaintiff and against the defendants and each of them, plaintiff now appearing by his attorneys, Welts & Welts, and the defendant Watkins Motor Company, a corporation, by its attorneys, Shank, Belt, Rode & Cook;

Therefore, It Is Hereby Ordered, Adjudged and Decreed that the plaintiff, Arthur Miles as guardian ad litem for Wilmer Bunney, a minor, does have and recover judgment against David Bunney and Clarence Bunney, co-partners doing business as Bunney Bros., and against Pound Motor Company, a corporation, now Watkins Motor Company, a corporation, in the sum of $3,000.00, together with costs and disbursements herein, and that the said Arthur Miles, individually, on the cause of action for medical expenses and hospitalization assigned to him by Clarence Bunney, does have and recover judgment against defendants David Bunney and Clarence Bunney, co-partners doing business as Bunney Bros., and also against Pound Motor Company, a corporation, whose name is now Watkins Motor Company, a corporation, in the sum of $780.20, in which said sums said judgments are hereby entered and each of them shall bear interest at the rate of 6 per cent per [76] annum from date hereof; for all of which let execution issue.

To all of which the defendant Watkins Motor

Company, a corporation, excepts and its exceptions are allowed.

Done In Open Court November 13th, 1940.

W. L. BRICKEY,
Judge

Copy received and service accepted November 25, 1940.

SHANK, BELT, RODE
& COOK,
Attorneys for Defendant
Watkins Motor Company,
a corporation.

Vol. 8 Execution Docket Page 256 recorded Judgement Journal Vol. 18 Page 484.

[Endorsed]: Skagit County, Wash. Filed Dec. 13, 1940. Arthur Eliason, County Clerk. By Will B. Ellis, Deputy. [77]

[Title of Superior Court and Cause.]

CERTIFICATE

I, Arthur Eliason, County Clerk of Skagit County, and ex-officio Clerk of the Superior Court of the State of Washington in and for said county, do hereby certify that the annexed and foregoing is a full, true and correct copy of the Judgment in the above entitled (matter) (action) as the same now appear on file and of record in my office. We further certify that said judgment has not been satisfied of record.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court this 2nd day of October, 1942.

[Seal] ARTHUR ELIASON,
Clerk [78]

DEFENDANTS' EXHIBIT No. A-1

AUTOMOBILE PURCHASE ORDER

Please enter my order for one automobile described as follows:

Make—Model—Color—Motor No.—Serial No.
Used truck 1938 #497
to be delivered on or about Dec. 4, 1940
#18-4295384

Selling Price of Car	$700.00
Sales Tax	14.00
License or Transfer	
Total	$714.00
Used Car Allowance	$375.00
1935 Ford Truck	
Less Payoff	
Motor No. 1304989	
Net Allowance	$
Original Deposit	
Cash on Delivery	$339.00
Total Credits	$714.00
Cash Balance Due	$339.00
Insurance	
Total	$339.00

Payable as follows:

Cash payable on delivery. We furnish rings and inserts. Housing and short drive shaft.

Memo. of trade in: Make, 1935; Model, Ford; Year, Truck.

Motor ..... Serial ..... License .....

Unless otherwise specified hereon no insurance protecting purchaser is included in price.

This order is not binding until signed and accepted by an authorized member of the firm. No agreements not contained herein will be recognized unless in writing and signed by a firm member.

Salesman, O. A. Pound.

Accepted by, O. A. Pound.

Purchaser, David Bunney.

Address, 207 So. 11 St.

663.00

339.00

---

324. [79]

DEFENDANT'S EXHIBIT No. A-2

Ford
Sales
Service

No. 3535

Mt. Vernon, Washington, 1-4-1940

Received of Bunney Bros. Three hundred thirty-nine & no/100 Dollars $339.00

1938 Truck in full

Detail	On Account	On Note	How Paid √	
Amount due			Cash	Pound Motor
Amount paid			Check	Company
Interest paid			Draft	2nd and Broadway
Disct. allowed			Money	Phone 5151
			Order	By EM
Balance due				

Form 48-A Norick Bros.
Printers, Okla. City

[80]

DEFENDANT'S EXHIBIT No. A-3

Know All Men By These Presents: That Bunney Brothers, by David Bunney, 707-11th st., Mount Vernon, Wn. of Skagit County, State of Washington, as mortgagor, is justly indebted to First National Bank of Mount Vernon, Wn., a corporation, as mortgagee, in the sum of Five Hundred Eighty-Five Dollars & 56/100 - - - Dollars, which is hereby confessed and acknowledged. Now, therefore, for the purpose of securing the payment of said sum, the mortgagors do by these presents grant, bargain, sell and mortgage unto the said mortgagee, its assigns and personal representatives, all that certain personal property described as follows, to-wit:

One 1930 Ford Sedan, Motor No. A2058277.

One 1938 One and one half ton Ford Truck, with 157 inch wheel base, Motor No. 4295384

together with all increases and acquisitions thereto, all of said property being now in the possession of said mortgagor, in Skagit County, Washington, and free from all incumbrances.

To Have and To Hold, All and singular, the personal property aforesaid forever; Provided always, and these presents are upon the express condition, that if said mortgagor shall pay, or cause to be paid to said mortgagee, its assigns or personal representatives, the sum of Five Hundred Eighty-Five Dollars & 56/100 - - - Dollars, and interest, according to the condition of one certain Promissory Note payable to First National Bank of Mount Vernon, Wn., to-wit:

Dates of Notes—1-4-40.

Amt. of Notes—Dollars, Cts., 585.56.

Dates notes are due—Mo. Instal. of $32.52 beginning 2-15-40.

Dates Notes draw interest from Mat.

Notes draw interest at the rate of 8% per After.

Interest payable—Maturity.

also any and all renewals thereof and such other moneys and credits as may be hereafter paid, loaned or advanced to or on account of the mortgagor by the mortgagee during the continuance [81] of this mortgage and not exceeding $800.00, then these presents to be void and of no effect. But if default be made in the payment of the said sum of money or the interest thereon, or any part thereof, at the time the same shall become due, or any attempt shall be made to remove any of said property from said County, or to dispose of the same without the written consent of the said mortgagee, or its assigns, or if said mortgagor shall fail or neglect to take proper care of any of said property, or if at any time said mortgagee shall deem itself insecure then and thereafter the entire debt secured by this mortgage shall be due and payable, and it shall be lawful, and said mortgagor hereby authorizes said mortgagee to take possession of all the property mentioned herein and foreclose this mortgage, and sell said property pursuant to law, and out of the proceeds of such sale to retain the principal and interest remaining unpaid on said notes, and all costs of such foreclosure sale together with a rea-

sonable sum of dollars, as attorney's fee, paying the overplus, if any there be, to said mortgagor.

The mortgagors further expressly agree that in case the proceeds of said sale shall not be sufficient to pay the amount due on this mortgage and the costs, expenses and attorney's fees upon foreclosure, they will pay the deficiency, and hereby consents that a deficiency judgment may be entered in the event of such foreclosure and sale.

In Testimony Whereof, The mortgagor hereunto subscribes their name this 4th day of January, 1940.

Signed and Delivered in Presence of

H. A. MOLDSTAD

Copy of original

BUNNEY BROTHERS

By DAVID BUNNEY [82]

Filing No. 320619
January 5-1940

State of Washington,
County of .....—ss.

..... Wash., ...19.....

Received from ..... and properly filed and indexed in my office, the chattel mortgage, described on the reverse side hereof.

C. P. KLOKE
Skagit Co. Auditor
County Auditor Mount
Vernon, Washington

By .....
Deputy

..... Wash., ...19.....

To the Auditor of ..... County, Wash.:

We hereby acknowledge full payment and satisfaction of the chattel mortgage described on the reverse side hereof, and authorize you to cancel the same on the records of your office and to deliver the original instrument to .....

(The above form to be used ..... when discharge is made direct to County Auditor.)

To ....., Mortgagor .....

We hereby certify that the Chattel Mortgage described on the reverse side of this instrument has been paid and discharged in full, and the County Auditor of said County is hereby authorized to satisfy and cancel the same.

Date at ..... Washington, ... 19....

Witnesses:

.....

.....

.....

By.....

(The above form to be used when discharge is made direct to Mortgagor.)

State of Washington,
County of .....—ss.

On this ..... day of ..... 19.....
before [83] me personally appeared .....
to me known to be the ..... of
the corporation that executed the within and foregoing instrument, and acknowledged the said in-

strument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument, and that the seal affixed is the corporate seal of the said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

.....

Notary Public in and for the State of Washington, residing at ..... in said County.

(If the person executing this release does not personally appear before the Auditor, the above acknowledgment should be executed.)

Received from ..... Audtor of ..... County, Washington, the mortgage herein mentioned this ..... day of ..... 19.....

.....

No. .....

SATISFACTION OF
CHATTEL MORTGAGE

.....

.....

Mortgagee

TO

.....

Mortgagor

Mar. 14, 1940.

This is to certify that the within is a true and correct copy of Chattel/ Mortgage given us by Bunney Brothers on within date.

FIRST NATIONAL BANK OF
MOUNT VERNON, WN.
ROY C. GALER
Asst. Cashier
S. WILBUR SPROUSE
[Seal] Notary
Mt. Vernon, Wash. [84]

District Court of the United States
Western District of Washington
Northern Division

No. 16.

LAURENCE P. BUNNEY, as Guardian of WILMER BUNNEY, a minor,

Plaintiff,

vs.

ASSOCIATED INDEMNITY CORPORATION, a corporation,

Defendant.

VERDICT

We, the jury empanelled in the above-entitled cause, find for the Plaintiff, and fix the amount of his recovery in the sum of Four Thousand Two

Hundred Fifty-eight and 65/100 Dollars, ($4,258.65).

CARL B. EVJEN,
Foreman.

[Endorsed]: Filed Oct. 7, 1942. [85]

[Title of District Court and Cause.]

JOURNAL ENTRY AS TO DIRECTION OF ENTRY OF JUDGMENT ON VERDICT

At 4:30 P.M., the jury returns into court with a verdict, counsel for both sides being present. Call of the jury is waived. The verdict is read, as follows:

> "We, the jury empanelled in the above-entitled cause, find for the Plaintiff, and fix the amount of his recovery in the sum of Four Thousand Two Hundred Fifty-eight and 65/100 Dollars, ($4,258.65.)"
>
> CARL B. EVJEN,
> Foreman.

The verdict is acknowledged by the jury and ordered filed. Judgment on the verdict is hereby entered by the Clerk for plaintiff, pursuant to the provisions of Rule 58 of the Rules of Civil Procedure. [86]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT N. O. V.

Comes now the Associated Indemnity Corporation, a corporation, defendant above named and moves the above entitled court that the verdict of the jury and judgment in the above entitled action be set aside and held for naught and that judgment in favor of the defendant be granted notwithstanding the verdict of the jury upon the grounds and for the reason that the verdict of the jury under the law and evidence should have been in favor of the defendant and against the plaintiff.

Dated this 12 day of October, 1942.

N. A. PEARSON,
Attorney for Defendant.

[Endorsed]: Filed Oct. 13, 1942. [87]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Without waiving the defendant's motion for judgment notwithstanding the verdict of the jury made herein but still insisting upon same the defendant moves for a new trial in the above entitled action for the following reasons:

I.

Irregularity in the proceedings of the court, jury or adverse party, and orders of the Court, and

abuse of discretion by which this defendant was prevented from having a fair trial.

II.

Accident or surprise that ordinary prudence could not have guarded against.

III.

Insufficiency of the evidence to justify the verdict, and that it is against the law.

IV.

Error in the law occurring at the trial.

N. A. PEARSON,
Attorney for Defendant.

[Endorsed]: Filed Oct. 13, 1942. [88]

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT

This matter having come on regularly before the above entitled Court on this 24th day of October, 1942, upon the motion of the defendant for judgment notwithstanding verdict, and the plaintiff appearing by his counsel, R. V. Welts and Henderson & McBee, and the defendant appearing by its counsel, N. A. Pearson, and the Court having heard the arguments of counsel, having examined the records and files herein, and being fully advised in the premises,

It Is Therefore Ordered, Adjudged and Decreed, that the motion of the defendant for judgment notwithstanding verdict be and the same is hereby denied.

To all of which the defendant excepts and which exception is hereby allowed.

Done in Open Court this 24th day of October, 1942.

JEREMIAH NETERER,
Judge.

Presented by:

R. V. WELTS,
Attorney for Plaintiff.

Approved as to form:

N. A. PEARSON,
Attorney for Defendant.

[Endorsed]: Filed Oct. 24, 1942. [89]

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

This matter having come on regularly before the above entitled court on this 24th day of October, 1942, upon the motion of the defendant for a new trial, and the plaintiff appearing by his counsel, R. V. Welts and Henderson & McBee, and the defendant appearing by its counsel, N. A. Pearson, and the Court having heard the arguments of

counsel, having examined the records and files herein, and being fully advised in the premises,

It Is Therefore Ordered, Adjudged and Decreed, that the motion of the defendant for a new trial be and the same is hereby denied.

To all of which the defendant excepts and which exception is hereby allowed.

Done in Open Court this 24th day of October, 1942.

JEREMIAH NETERER,
Judge.

Presented by:

R. V. WELTS,
Attorney for Plaintiff.

Approved as to form:

N. A. PEARSON,
Attorney for Defendant.

[Endorsed]: Filed Oct. 24, 1942. [90]

In the District Court of the United States
Western District of Washington,
Northern Division

No. 16

LAURENCE P. BUNNEY, as Guardian of WILMER BUNNEY, a minor,

Plaintiff,

vs.

ASSOCIATED INDEMNITY CORPORATION, a corporation,

Defendant.

JUDGMENT

This matter having come on regularly before the above entitled court upon this 24th day of October, 1942, upon the application of the plaintiff for the entry of judgment herein, and the above entitled cause having been duly and regularly tried by the above entitled Coura on the 7th day of October, 1942, to a jury, and the plaintiff appearing by his counsel, R. V. Welts and Alfred McBee, and the defendant appearing by its counsel, N. A. Pearson and John A. Milot, and both parties having introduced their evidence and rested, and counsel for the respective parties having made their oral argument to the jury, and the jury having retired to consider its verdict and returned with its verdict in open court, which said verdict, omitting the formal parts thereof, read as follows:

"We, the Jury in the above entitled cause, find for the plaintiff and fix the amount of his

recovery in the sum of Four Thousand Two Hundred Fifty-eight and 65/100 Dollars ($4,258.65). Carl B. Evjen, Foreman.";

and the defendant having timely made its motions for a new trial and judgment notwithstanding the verdict, which said motions have been heard and considered by the above entitled Court, and the above entitled Court having made and entered separate orders denying said motions and each of them, and the Court having examined the records and files herein and being [91] fully advised in the premises,

It Is Therefore Ordered, Adjudged and Decreed, that the plaintiff be and he is hereby given judgment against the defendant in the sum of Four Thousand Two Hundred Fifty-eight and 65/100 Dollars ($4,258.65), and for his costs and disbursements herein in the sum of Twenty-seven and 50/100 Dollars, ($27.50).

To All of Which the defendant excepts, which exception is hereby allowed.

Done in Open Court this 24th day of October, 1942.

JEREMIAH NETERER,
Judge.

Presented by:

R. V. WELTS,
Attorney for Plaintiff.

Approved as to form:

N. A. PEARSON,
Attorney for Defendant.

It is agreed that in the event of appeal bond will be $5000.00.

WELTS & WELTS,
HENDERSON & McBEE,
Attorneys for Plaintiff.
N. A. PEARSON,
Attorney for Deft.

[Endorsed]: Filed Oct. 24, 1942. [92]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Associated Indemnity Corporation, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on October 24th 1942 awarding to plaintiff the sum of $4,258.65 with costs in the sum of $27.50, and from Order Denying Motion for Judgment Notwithstanding Verdict and Order Denying Motion for New Trial entered on the same date and from all orders and rulings in the above entitled action.

N. A. PEARSON,
Attorney for Appellant Associated Indemnity Corporation.

Office and P. O. Address:
413 Arctic Bldg.,
Seattle, Washington.

[Endorsed]: Filed Dec. 12, 1942. [93]

[Title of District Court and Cause.]

STIPULATION FOR APPEAL AND SUPERSEDEAS BOND ON APPEAL

It is hereby stipulated and agreed that the amount of Appeal and Supersedeas Bond, which includes costs, shall be the sum of Five Thousand ($5,000.00) Dollars.

Dated this 8th day of December, 1942.

WELTS & WELTS,
By R. V. WELTS,
HENDERSON & McBEE,
Attorneys for Plaintiff Appellee.
N. A. PEARSON,
Attorney for Defendant Appellant.

[Endorsed]: Filed Dec. 9, 1942. [94]

[Title of District Court and Cause.]

SUPERSEDEAS AND COST BOND ON APPEAL

National Surety Corporation, New York, Vincent Cullen, President.

Know All Men By These Presents: That we, Associated Indemnity Corporation, the Defendant above named, as Principal, and the National Surety Corporation, a corporation organized under the

laws of the State of New York, and authorized to transact the business of surety in the State of Washington, as Surety, are held and firmly bound unto Lawrence P. Bunney, as Guardian of Wilmer Bunney, a Minor, the Plaintiff above named in the just and full sum of Five Thousand and no/100 Dollars ($5000.00), for which sum, well and truly to be paid, we bind ourselves, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 1st day of December, A. D. 1942.

The Condition of This Obligation Is Such, that whereas, the above named Plaintiff on the 24th day of October, 1942, in the above entitled action and court recovered judgment against the Defendant above named for the sum of Four Thousand Two Hundred [95] Fifty-eight and 65/100 Dollars ($4258.65), plus costs of Twenty-seven and 50/100 Dollars ($27.50); and

Whereas, the above named Principal has heretofore given due and proper notice that it appeals from said decision and judgment of said District Court to the Circuit Court of Appeals;

Now, Therefore, if the said Principal, Associated Indemnity Corporation, shall pay to Lawrence P. Bunney, as Guardian of Wilmer Bunney, a Minor, the Plaintiff above named, all costs and damages that may be awarded against it on the appeal, or on the dismissal thereof, and shall satisfy and per-

form the judgment or order appealed from, in case it shall be affirmed, and any judgment or order which the said Circuit Court of Appeals may render or make, or order to be rendered or made by said District Court, then this obligation to be void; otherwise to remain in full force and effect.

ASSOCIATED INDEMNITY CORPORATION:
By N. A. PEARSON,
Its Attorney (Principal).
NATIONAL SURETY CORPORATION:
By J. H. LOBDELL,
Attorney-in-Fact.

O. K.:
R. V. WELTS
for WELTS & WELTS,
HENDERSON & McBEE,
Attorneys for Plaintiff.

Approved:
JOHN C. BOWEN,
Judge.

[Endorsed]: Filed Dec. 12, 1942. [96]

[Title of District Court and Cause.]

DESIGNATION OF POINTS UPON WHICH APPELLANT INTENDS TO RELY

Comes now Associated Indemnity Corporation, defendant above named and appellant and desig-

nates the following as the points upon which appellant intends to rely in said appeal:

1. That under the law and evidence the verdict should have been for the defendant.

2. That the court should have taken the case from the jury and dismissed the case at the close of the evidence and have granted defendant's motion for dismissal.

3. That the Court should have granted defendants motion for judgment notwithstanding the verdict.

4. That the Court should have granted a New Trial.

5. That defendant's insurance policy did not cover the 1935 truck at the time of the injury.

6. That the insurance coverage terminated upon the 1935 truck and was automatically transferred to the 1938 truck on January 4 1940, the day before the accident.

7. That Wilmer Bunney was an employe engaged in the operation maintenance or repair of the truck at the time of the accident and was excluded from the protection of the policy.

8. That said policy excluded any person from its coverage while entering upon, riding in or alighting from said truck. That Wilmer Bunney was injured while entering upon, riding in or alighting from said truck and therefore not covered.

9. That assured under the policy failed to notify the defendant Company promptly of said accident. That the accident happened [97] January 5 1940 and was not reported to the Company until February 1st 1940 to its prejudice.

10. That the policy provided that it did not apply to any accident which occurred after the transfer during the policy period of the interest of the insured in the truck without the written consent of the Company. That the insured parted with and transferred his entire interest in said truck on January 4th 1940 without the written consent of the company. The accident happened January 5 1942.

11. That said policy covered the several liabilities of David Bunney and Clarence Bunney doing business as Bunney Brothers and did not insure the several liabilities of the two individuals. That the use of the truck at said time was the individual liability and operation of David Bunney, Clarence Bunney having no interest therein.

12. That said policy excluded coverage while the motor vehicle was operated by any person under the age of 14 years. That Wilmer Bunney was assisting in the operation of the truck at the time of the accident and was of the age of 13 years.

13. That the Court erred in withdrawing from the jury the following questions:

Delayed notice of the accident.

Whether or not Wilmer Bunney was an employe.

Whether or not Wilmer was entering upon, riding in, or alighting from the truck.

Whether or not Wilmer Bunney operating the truck, or assisting in its operation, he being under the age of 14 years.

The automatic coverage of the policy to cover the 1938 truck and the elimination of coverage on the 1935 truck on which the accident happened.

14. That the Court erred in instructing the jury in the following particulars: [98]

In limiting the jury to the 1935 truck ownership as being decisive of the action and informing the jury that the only question was the ownership of the 1935 truck.

In instructing the jury that the Bunney Brothers were not in the passenger carrying business as indicating that that would have some bearing upon whether or not Wilmer Bunney was riding in, entering upon, or alighting from the truck at the time of the accident.

In instructing the jury that because the truck was not moving Wilmer Bunney could not be said to be riding therein.

In instructing the jury that because the truck was not in motion Wilmer Bunney could not be operating it.

In instructing the jury that the 1935 truck would still be covered until its delivery to Pound Motor Company disregarding the policy statement that coverage ceased on the 1935 truck upon the delivery to Bunney Bros. of the 1938 truck.

In instructing the jury that the 1935 truck had to be put into a deliverable condition before title passed.

In instructing that as long as title remained in Bunney Bros. of the 1935 truck it would be covered by the policy.

15. That the court erred in failing to give defendant's requested instructions as follows:

To bring in a verdict for the defendant.

That "the mere fact that David Bunney desired to transfer the body from the 1935 truck is no indication and is not to be taken by you that he had any title in or to said truck on and after the 4th day of January, 1940, if you find that he sold and delivered title of said truck to other parties on January 4th 1940."

If they found that Wilmer Bunney was an employe that their verdict should be for the defendant.

That if they found that Wilmer Bunney was entering upon, [99] riding in or upon said truck at the time of the accident he would not be covered by the policy and that "the word 'riding' does not necessarily mean that the truck would have to be in motion, the fact that he was in or on said truck would be sufficient to come within the meaning of the word riding."

The requested instruction that "You are instructed that if you find from the evidence in this case that the 1935 truck was transferred to the Pound Motor Company on January 4th, 1940, and that on said date said Bunney Brothers, or either of them, purchased a 1938 Ford truck trading said 1935 Ford Truck to said Pound Motor Company as a part of the purchase price and paying the balance

due on said 1938 Ford Truck in cash and that on said date, to wit, January 4th, 1940, said Bunney Brothers, or either of them, took delivery and actual physical possession of the new 1938 Ford Truck then I charge you that said inlurance written by defendant on said 1935 Truck automatically terminated upon said 1935 Truck and automatically covered the 1938 truck and that the policy did not cover the said 1935 truck after January 4th 1940, and if you find that the accident occurred on January 5th, 1940, then I charge you that there would be no recovery in this case and your verdict must be for the defendant."

The requested instruction that "the policy did not apply to any vehicle while being operated by any person under the age of 14 years and if you find that said Wilmer Bunney was under the age of 14 years and was assisting in the operation of said truck at the time of the accident then I charge you that said insurance policy did not apply at the time of the accident and your verdict must be for the defendant."

N. A. PEARSON
Attorney for Defendant.

[Endorsed]: Filed Dec. 12, 1942. [100]

[Title of District Court and Cause.]

STIPULATION FOR RECORD ON APPEAL

It is hereby stipulated and agreed between Plaintiff by his attorneys Welts & Welts and Henderson

& McBee and Defendant by its attorney N. A. Pearson, that the Clerk of the above entitled Court shall prepare and send to the Circuit Court of Appeals the following Record on Appeal.

Complaint.

Removal papers from State Court, including in this all the papers sent to the District Court from the State Court.

Answer, complete with all defenses etc.

Reply.

Reporter's transcript of evidence and proceedings entitled "Bill of Exceptions."

Verdict and direction of entry of judgment thereon.

Judgment.

Motion for Judgment Notwithstanding the verdict of the Jury.

Motion for New Trial.

Order Denying Judgment Notwithstanding the Verdict of the Jury.

Order denying New Trial.

Judge's "Certification of Statement of Facts on Pre-Trial Hearing."

All Exhibits.

Stipulation for Bond.

Notice of Appeal with date of filing.

Appeal and Supersedeas Bond.

Stipulation for Record on Appeal. [101]

Designation by Appellant of Points upon which he intends to rely.

Clerk's Certificate.

Defendant's Proposed Instructions.

Nothing other than stated herein need be sent up as part of the Record on Appeal.

N. A. PEARSON
Attorney for Defendant Appellant.
WELTS & WELTS
HENDERSON & McBEE
Attorneys for Plaintiff Appellee.

[Endorsed]: Filed Dec. 12, 1942. [102]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD

United States of America,
Western District of Wash.—ss.

I, Judson W. Shorett, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered from 1 to 102, inclusive, is a full, true and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause as is required by Stipulation of Counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Bellingham, Washington, except as to the Reporter's transcript of testimony (entitled Bill of Exceptions), the original of which is enclosed herewith as part of the record on appeal in this cause, and that the same constitute the rec-

ord on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit. [103]

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the Appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's fees (Act Feb. 11, 1925) for making record, certificate or return, 229 folios at 15c	$34.35
76 folios at 05c (copies furnished)	3.80
Appeal fee (Sec. 5 of Act)	5.00
Certificate of Clerk to Transcript of Record	.50
Total	$43.65

I further certify that the foregoing amount has been paid to me by the attorney for the Appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 12th day of January, 1943.

[Seal] JUDSON W. SHORETT,
Clerk United States District Court, Western District of Washington.
By MAUD R. ROGERS,
Deputy. [104]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Be It Remembered that, heretofore and on, to wit, the 7th day of October, 1942, at the hour of 10:00 o'clock A. M., the above entitled and numbered cause came on for trial before the Honorable Jeremiah Neterer, one of the Judges of the above entitled Court, presiding at Bellingham, Whatcom County, Washington, sitting with a jury.

The plaintiff appearing by R. V. Welts, Esq., of the firm of Welts & Welts, and by Alfred McBee, Esq., of the firm of Henderson & McBee, his attorneys and counsel; the defendant appearing by and through N. A. Pearson, Esq., its attorney and counsel.

And both sides having announced they were ready to proceed to trial, and a jury to try the cause having been duly empanelled and sworn to try said cause;

Whereupon, the following proceedings were had and testimony given, to wit:

Mr. Pearson: We, at this time, ask for the exclusion of all witnesses.

Whereupon the witnesses were sworn, and excluded from the court room.

Mr. Welts: May it please the Court, Ladies and Gentlemen of [1*] the Jury:

By the Court: (Interrupting) This Certificate, of course, is final as to everything that it contains.

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*Page numbering appearing at foot of page of original Reporter's Transcript.

By Mr. Welts: My name is R. V. Welts. I practice law in Mount Vernon, and have for the past twenty-eight years. Mr. McBee, also, seated at the table, is an attorney from Mount Vernon, and we are representing the child, Wilmer Bunney, who is bringing this action through his Guardian, his grandfather, who, in law, as guardian for the child has to bring this suit in the guardian's name. The action is against the Associated Indemnity Corporation, which is an insurance corporation, represented by Mr. Pearson and Mr. Milot.

The suit, as the Court has told you, is on a judgment. There was a prior trial, and the child was awarded some $3800.00, the amount the Court will tell you later, because of burns and injuries that he received when gasoline became ignited or exploded and flew over his clothing as he was pouring gasoline, at the request of the Bunneys, into the carburetor of a stalled truck.

We held, yesterday, what is known as a pre-trial conference under the law. The Court calls the lawyers in, and they try to settle some of the facts and questions involved, and many of them were settled so that witnesses will not be called to testify to many of the facts, because the Court has written a Certificate as to what those facts are, and I assume that it will be read to the jury as a part of the evidence.

Now, just so that you may understand what this is about, before I read what the Court says are facts that [2] are agreed upon, let me say this: David Bunney, who was one of the witnesses who

retired, owned an automobile truck, back in 1939, and his brother, Clarence Bunney, owned a truck, and they registered the trucks in the name of Bunney Brothers, and were doing W.P.A. hauling with the trucks and obtained a permit from the State of Washington, from the Department of Public Service, so they could use the public roads to use their trucks upon.

David Bunney was doing this hauling with his truck, and wanted a better truck necessary to do that hauling, and he negotiated with a local company there, known as Pound Motor Company, after he had been notified by the W.P.A. authorities to have his equipment inspected for continued work on that job. So, to get a newer vehicle to use, along the latter part of December, 1939, and first part of January, 1940, he was negotiating with Pound Motor Company, of Mount Vernon, for a 1938 Ford chassis and cab. The truck which he owned—and this is a little bit complicated, but I think you will follow it—the truck which he owned was a 1935 truck. It had on it a steel body. In the negotiations to turn his truck in and get the newer truck, ultimately the two parties, that is, Mr. Bunney and the Motor Company, agreed that there would be an allowance of $375.00 made for the 1935, the old truck, but that Mr. Bunney would keep the steel body that was on it; the motor company would not get the steel body, but there was another, wooden body on another truck that the Bunneys had, and the motor company was to get the 1935 truck with

the wooden body put on it and delivered to Pound Motor Company. [3]

On the 4th day of January, the parties came to an agreement on the amount of money involved and, at that time, Mr. Bunney drove the new truck around, and was satisfied. It was just a bare truck, just the chassis and cab; there was no body on it, you understand. And they agreed on the amount of money that would be paid for the new truck and the amount of credit that would be given for the old truck. Mr. Bunney then paid the difference and drove the 1938 chassis and cab away, but the steel body had not been taken off the equipment that Pound Motor Company was to buy, and when he paid the balance and took the new chassis away, he turned over to Pound Motor Company the registration certificate on it, but there still had to be the change of bodies to make. At that time, the steel body was still on the truck that Pound Motor Company was ultimately to get, and Mr. Bunney was to put the right body on that truck, take the steel body off and put it on the one he had acquired, and then deliver the old truck down town to the Pound Motor Company, thereby completing the deal.

At the time that he took the new truck away, I think the evidence will show, and I think the Certificate of the Court shows it—I will read it in just a minute—that Mr. Bunney said, or testified, or would testify that he asked Pound Motor Company if he could keep the old truck a few days,

because he was busy, before changing the bodies, and Pound Motor Company said change the bodies and deliver the 1935 truck as soon as you can.

The next day, January 5th, is the day this accident happened. On that day, he got another brother—David [4] Bunney did—Daniel Bunney, to help him to take the steel body off the old truck, put it on the new chassis, get the wooden body and put it on the old truck, and then he was going to deliver the old truck to Pound Motor Company. The young man lived in Mount Vernon, up on the hill. The 1935 truck with the steel body on it was then situated in a stub street, a dirt street, right adjoining the Bunney home, that is, the child's home. David Bunney and the brother moved the old truck with the steel body on it to take it close to the yard so they could take the steel body off to put on the other truck and, after they had moved it a short distance, one wheel dropped down in a soft spot in the road, and they couldn't make it go any farther on its own power. It tilted, and it wouldn't get gasoline fed through the fuel pump into the carburetor; it wouldn't go. After trying to move it on its own power, David Bunney then hooked the new chassis onto the old truck with a chain and tried to pull it, but that didn't work. Leaving the two vehicles hitched together with the chain, David Bunney then called to this child, who was playing basket ball in the yard adjoining —he was a fifteen year old boy, in school, then— to come over to the truck to pour some gasoline

into the carburetor. He called him the second time to come over, and the boy came over then, and he handed him a tomato can and told the child to pour the gasoline into the open carburetor. The child took the can of gasoline, and I am not exactly clear as to how he did it, but I think as he explained it this morning, he leaned across the fender with one foot dangling down on the ground, and was pouring the [5] gasoline into the open carburetor. Now, the brother, Daniel, the child's uncle, was seated at the steering wheel of this old truck and had been trying to start it, and was then probably trying to start it. The uncle, the other uncle, David Bunney, who had called the child there to do this, and who owned the equipment, was seated in the second truck to furnish pulling power with that vehicle.

In the process of starting the truck, either through the combined efforts of the two men, one at the wheel of the steel truck and the other pulling with the other truck, the fact was that the motor backfired and, as the child was pouring this gasoline out of an open can, when the motor truck backfired, this exploded and the gasoline went all over the child and the child was completely aflame. They got him put out, and he was in the hospital for some time, and for that, the judgment was recovered against Bunney Brothers. That judgment is owned by the guardian and is unpaid. Bunney Brothers had coverage with the Associated Indemnity Corporation, the defendant here, in

amounts greater than the judgment, and the guardian now, by this suit, asks you to find that he should collect the judgment from the insurance company under the policy which will be before you.

Now, as to the things that do not have to be proven, I will read this Certificate as the result of the conference between the lawyers and the Court yesterday under the court procedure that we have nowadays to try to shorten things so we won't have to put so many witnesses on the stand to take your time: [6]

(Reading) "This cause coming in for pre-trial hearing under Rule 16 of the Rules of Civil Procedure, plaintiff appearing by Messrs. Welts & Welts and Messrs. Henderson & McBee, and defendant appearing by Mr. N. A. Pearson, and the hearing on pre-trial having been had, the following facts were found and certified by the Court:

"On January 4, 1940 the Registration certificate for the truck on which the accident happened was delivered to Pound Motor Company, and Bunney, the owner of the old truck on which the accident happened stated that he desired to take the steel body off his old truck and put it on the new truck and put on the old truck the wooden body which was to be a part of the equipment bought by Pound.

"When the certificate of title was delivered"—that is the ownership certificate that we are always supposed to keep in our safe box, but don't. "When the certificate of title was delivered Bunney said,"

to Pound, "When I come to take delivery on the 1938 truck I asked him if I could have the 1935 truck a few days, that I was going to be rather busy. 'Yes,' he said, 'but will you change the bodies and bring it down as soon as you can.' I said I would."

Bunney would testify to that, should we put him on the witness stand.

"It is agreed that the statement of facts in Cause No. 16431 in the Superior Court of Skagit County, entitled Arthur Miles as Guardian ad litem for Wilmer Bunney, a minor, and individually, Plaintiff, vs. David Bunney and Clarence Bunney, etc., et al, defendants, is a correct transcript of the testimony in that case and may be used [7] on the trial of this case for reference purposes without calling the official court reporter who transcribed the same."

That doesn't interest you at all. It is simply agreeing that, when the other case was tried, this was the testimony that was givn there, and if anybody wants to examine that they may do so without calling the court reporter from Mount Vernon. If either lawyer wants to use it in examining further any witness.

(Reading) "It is agreed that the following defendant's exhibits may be considered without any further proof and are only open to objection on the question of materiality on the trial, to wit:

"A-1, Automobile Purchase Order.

"A-2, Receipt,

"A-3, Chattel Mortgage,

same being photostatic copies of originals.

"The following Plaintiff's exhibits are admitted in evidence as follows:

"1. Copy of insurance policy issued to David Bunney and Clarence Bunney by the defendant Associated Indemnity Corporation on December 14, 1939"—That would be before this accident happened—"and expiring December 14, 1940"—that would be long after the accident happened—"being insurance policy No. 253987 together with all endorsements placed thereon by the defendant and being the policy and endorsements in this law suit. Also the certified copy of the permit issued by the Department of Public Service of the State of Washington to David and Clarence Bunney dated October 16, 1939 and in effect until the time subsequent to the injury herein in question under [8] which David Bunney was operating his vehicle.

"Attorneys for the defendant"—That is Mr. Pearson—"do not admit that the permit was in effect at the time of the injury.

"2. Certified copy of Rules 30,——"

On that score, as to whether it was in effect or not, my evidence will be that the permit and the exhibit bears the Certificate of the Secretary of the Department of Public Service of the State of Washington, under his seal, saying that it was in effect. If he has some evidence showing it was not, then he will have to produce it, but my evidence is in effect that it was, because when you operate a truck on the highway doing hauling under the

Public Service laws, the Department of Public Service has charge over that, and you have to get a permit from the State to do it, and the law requires that the operator has to file with the State an insurance policy and keep it in force to protect third people, the public, or any one who might be injured by the equipment and, pursuant to that, I procured the certified copy of the policy with the certificate that it was in effect at the time of the accident.

(Reading) "2. Certified copy of Rules 30, 31, 33, 34, and General Order No. 68 of the Department of Public Service of the State of Washington, which were in effect on January 5, 1940."

These are the rules and regulations which, under the law, the Department of Public Service made, and had power to make, requiring the filing of insurance policies by permitted operators in order to operate on the highways, [9] and setting out the nature of the endorsements and the guarantees to pay judgments as set forth therein. That is in evidence now, without my introducing it over.

(Reading) "3. Certified copy of the Judgment rendered in Cause No. 16431 of the Superior Court of Skagit County. Said judgment is unpaid and unsatisfied."

No question about that. They admit that; marked Exhibit 3. This is a certified copy of the Judgment of the court down in Skagit County, entered almost two years ago, certified by the County Clerk, under which the child, through his guardian,

recovered damages in the sum of $3780.20, together with trial costs, and that it bears interest at Six percent from apparently November 13, 1940. There is no question about that. If we are entitled to anything, we are entitled to that amount with interest, which will be figured, I presume, and submitted to you as a lump sum by the Court, so you won't have to figure it out.

(Reading) "It is admitted that the plaintiff"—the one bringing this suit—"is the general guardian of the infant and owns the judgment.

"It is admitted that the Insurance Company is authorized to do business in the State of Washington and is duly licensed, and has paid all fees due the State of Washington.

"It is agreed that the Judgment (Plaintiff's Exhibit 3) was entered for personal injury and necessary and required hospitalization and medical care caused by accident arising from use of the truck named in defendant's policy, being the 1935 truck. [10]

"It is agreed that on the 5th day of January, 1940, pursuant to notice"—It is written notice—"from the W. P. A. Authorities to assemble his equipment for inspection on a W. P. A. hauling job in which the Bunneys, including David Bunney, were to use David Bunney's truck under Public Service Certificate, David Bunney with the assistance of his brother Daniel Bunney started to move the 1935 truck so that the steel body could be taken therefrom and put on the 1938 chassis and the

wooden body could be placed on the 1935 truck and it could be delivered to Pound Motors.

"After he had moved the 1935 truck a few feet one of the wheels bogged down causing the vehicle to tilt so that the gas would not feed and the motor would not run. Thereupon David Bunney got the 1938 chassis and cab called the 1938 truck and hitched on to the other truck and attempted to pull the vehicle out, by means of a physical connection between the two trucks. Thereupon he called to the child Wilmer Bunney who was playing basket ball and told him to come and pour a can of gasoline into the carburetor of the 1935 truck. After the second call the child came, David Bunney giving him a tomato can full of gasoline, removed the flame arrestor from the carburetor of the truck, and the child started to pour the gasoline into the carburetor of the 1935 truck. David Bunney got into the 1938 truck which was physically connected to the 1935 truck and pulled on the 1935 truck. The brother Daniel Bunney was sitting in the 1935 truck at the steering wheel to guide it. It is in dispute between the parties whether the back firing of the motor of the [11] 1935 truck was produced by Daniel Bunney attempting to start the motor with the starter of that truck, or whether it was produced by the action of David Bunney in pulling on the 1935 truck with the 1938 truck."

We will let the witnesses tell what they did.

"The defendant has no testimony to offer"——

Now, just before I read that, the Insurance Com-

pany claims that, among other things, after the accident happened on the 5th, they were not notified until the first of February, a lapse of some two or three weeks, twenty-six days, I guess, twenty-six or twenty-seven days, and we replied to that, as soon as they were notified, a few weeks later, they were not prejudiced in any way, and they say: (Continues reading) "The defendant has no testimony to offer that it was prejudiced by reason of the failure to give notice of the accident at the time it occurred instead of February 1, 1940."

Then, I say: (Continues reading) "The plaintiff will offer affirmative testimony that the defendant was not and could not be prejudiced by failure to give such notice for the following reasons:

"First, the only persons present when the accident occurred were the mother of the child, the child, Daniel Bunney and David Bunney. Immediately following notification to the insurance company its representative came to Mount Vernon and contacted Mr. R. V. Welts who took the representative to the Clarence Bunney home and saw that he met Mrs. Bunney, the child's mother, and interviewed her in Mr. Welts' presence, and was authorized by Mr. Welts to interview her if he wished in my absence,"— [12] In other words, I took him up an introduced him, and said talk to them if you want to, and he did so in my absence—(Continuing reading) "and took a complete statement of all facts which she knew. He was also put in touch with the brother Daniel Bunney, and his own policy

holder David Bunney, interviewed them and each of them and took statements from them pertaining to the accident. That all of these parties continued to reside in Mount Vernon for a period of time after they were interviewed by the insurance company, and thereafter the child and his parents moved to Everett where they have been and are now located. The operators of the Pound Motor Company who had anything to do with the truck transaction here in question were G. A. Pound and Orville Pound and none other. They remained in Mount Vernon and were interviewed by the insurance company. G. A. Pound is still there and the son Orville is at Fort Lewis having been in the armed services now for only a few months. No facts known by plaintiff's counsel were withheld from the insurance company."

Those are the things that I offered to prove to show that the insurance company was not prejudiced because of that short time from January 5th to February 1st in the insurance company's policy holder telling them that this had happened.

(Reading) "The defendant has no refuting evidence to offer."

The Court then says: (Reading) "The only open issue upon the facts is the ownership of the 1935 truck at the time of the accident and whether the child was standing [13] on the ground or whether he was sitting on the fender of the truck at the time the gasoline was poured into the carburetor, and what Daniel Bunney and David Bunney were

doing at the time of the accident with relation to starting the 1935 truck and the pulling by the 1938 truck, and Daniel Bunney stepping on the starter of the 1935 truck."

Those are the only three things upon which evidence will be introduced before you: the ownership of the 1935 truck at the time the accident happened is one; whether the youngster was on the ground or on the fender of the truck when he was doing the pouring, purely a technical thing; and, third, what the two men were doing with the trucks, that is, whether one man was stepping on the starter, and what the other man pulling the truck did. Now, those are the things that evidence will be submitted upon.

Our evidence produced upon the witness stand, ladies and gentlemen of the jury, will be that Bunney still had the ownership of the old 1935 truck, and he continued to have that ownership under the law——

By the Court: We will have the argument later.

By Mr. Welts: Which will be proven by these circumstances:

Mr. Pound and the salesman who made the deal testified, and will testify that, on the sale transaction, and as a part of the sales transaction, Bunney agreed and he was to put the old truck in deliverable condition, so it could be delivered, by taking off the steel body, which belonged to him, and putting back on it the wooden body which Pound had purchased, and that Bunney was to deliver [14] the

truck thus assembled down to the Pound Motor Company, and that was part of Bunney's agreement under the sale, and our position before you in this court is that, until those things had been done, full ownership of the truck did not go to Pound; therefore, Bunney owned it at the time the accident happened, and those are the facts that will be produced to show you that Bunney owned the truck and his insurance policy covered.

On the other two issues, the child will be called and will tell you where he was when he was pouring the gasoline, and Daniel and David Bunney will be called and tell you what each of them was doing at the time the truck back fired and the child was injured. That is the evidence that we will offer.

By Mr. Pearson: Your Honor, Ladies and Gentlemen of the Jury: I could reserve my statement until the close of plaintiff's case, but I believe that you are entitled to know at this time just what we contend so that you will be able to intelligently weigh the evidence as it comes from the witness stand. Counsel told you I am Mr. Pearson, and my associate, Mr. Milot, are the attorneys for the insurance company. The general statement of Mr. Welts is largely illustrative of what happened out there.

The facts remain, however, that our policy covered the 1935 truck—now, just remember the 1935 and 1938 truck. That is all the essence involved in the case, and it won't sound half so confusing. I will admit that it took me a long time to get these

trucks and truck bodies and things assembled. The 1935 truck and the 1938 truck are the only trucks involved. The insurance policy [15] which is here in evidence shows you that this insurance policy was written on the 1935 truck. This accident happened on the 5th of January, the day after the trucks were exchanged.

On January 4th, the day before the accident, Bunney went down to the Pound Motor Company and traded in his 1935 truck on the 1938 truck, took the 1938 truck out and put a mortgage on it and raised the $339.00, and took that back to Pound Motor Company, and that paid for the 1938 truck, which then was his when he took delivery of it. Then, on the 4th day of January—now this is after the deal was completed; they had agreed before this that he was to have the steel body on the 1935 truck and put his old wooden body on the 1935 truck and give the Pound Motor Company the old 1935 truck with the old wooden body. That is all agreed. The money had passed. Pound had gone out there and seen the wooden body and saw the chassis and was satisfied. He bought it.

Now, after Bunney took the 1938 truck, after he had paid for it, and after he had mortgaged it, he said to Pound, "I would like to have a few days before I transfer the body." "That's all right," Pound says, "do it as soon as you can and bring it in." So that was the situation then.

On the accident, itself, the testimony will show you, I believe, that at the time of the accident,

Daniel Bunney, another brother, was seated at the wheel of the 1935 truck; David Bunney was on the 1938 truck, had a tow line attached to the 1935 truck which was bogged down in the mud, couldn't move, stalled; that he came out, [16] called over Wilmer Bunney, the young man here, thirteen years of age then; he says: "Come over here and pour some gasoline in this carburetor," and Wilmer came; that he climbed up on the fender and poured the gasoline in the carburetor. It seems there is an air cleaner that they disconnect first so he can pour it in, and when he did that, Daniel Bunney stepped on the starter to start the engine, and the spark ignited the gasoline which caught fire and produced the injuries complained of.

Now, our policy has a number of exclusions in it which I will point out to you, in our defense, set out in the pleadings. As the Court told you, this action is limited to the action on the 1935 truck. It is our contention, of course, that the 1935 truck was owned by the Pound Motor Company. They had title to it. The day before the accident, they took the certificate of title. The certificate of title, you know, not as Counsel says you are supposed to keep in your safe deposit box; he knows, and the law requires you to keep that upon the steering post of your truck. He signed that and delivered it to Pound Motor Company, the day before, for the truck, and passed all title to it.

It is our contention that, in calling Wilmer Bunney over there to pour gasoline into the carburetor,

Wilmer Bunney was working then for the Bunney Brothers at that particular moment. That is not a very long employment, but it was an employment. The policy does not apply under coverage A: (Reading) "This policy does not apply under Coverage A, nor under insurance agreement II, to bodily injury or death of any employee of any insured [17] while engaged in the business of any insured other than domestic employment, or in the operation, maintenance, or repair of the automobile."

It is our contention the evidence will show that this operation in starting the motor was in the maintenance or repair of the automobile to get it going.

The policy also excludes——

By the Court: (Interrupting) Without referring to the testimony, this is really argument. Just say what the testimony will be.

By Mr. Pearson: Yes, Your Honor. The evidence will show that it is what we call a passenger hazard exclusion, as follows: (Reading) "It is agreed that the insurance afforded by the policy shall not apply with respect to liability"——

By the Court: (Interrupting) I said, a while ago, the reading of testimony ought not to be made with the argument. Tell what your testimony will be. That is the argument.

By Mr. Pearson: I think the jury ought to be told what our contentions are.

By the Court: You have stated your conten-

tions. Explain what your testimony is, without reading.

By Mr. Pearson: It has an exclusion also in the policy, and also in the certificate issued by the Department of Public Works, excluding anybody alighting from, riding in or entering upon the automobile. Now, this boy was on the fender, on the truck itself, when he poured this gasoline in.

The evidence will also show you that, although this accident happened on the 5th day of January, it was never [18] reported to the company until February 1st, 1940. The policy—the evidence will show you that the policy provides for automatic coverage of newly acquired equipment; that upon the taking of delivery of the 1938 truck, the coverage of the policy immediately was transferred from the 1935 truck to the 1938 truck, and was immediately extinguished upon the 1935 truck; that there was no coverage upon the 1935 truck at the time of the accident, because he had taken delivery of the 1938 truck and it was transferred to that.

Evidence will also show you that the policy also provides that any change in the ownership of the truck covered by the policy, which is the 1935 truck, automatically terminates and, as I have shown, he transferred title to it the day before to Pound Motor Company.

We will also show that this boy was of the age of thirteen, and that the policy excluded a coverage to anybody under the age of fourteen years assisting in the operation of the truck at that time;

that the policy simply didn't cover at the time of this accident.

That is the position of the defendant at this time. I just tell you these things so you will know our position as you go along.

WILMER BUNNEY,

produced and sworn as a witness on behalf of plaintiff, upon oath testified as follows:

Direct Examination

By Mr. Welts:

Q. Would you state your name?

A. Wilmer Bunney. [19]

Q. You live now where? A. Everett.

Q. Are you in school? A. Yes.

Q. Wilmer, do you remember the occasion when you were hurt with the gasoline exploding and you were burned when you were fixing the truck in January, 1940? A. Yes.

Q. How old are you?

A. Fifteen, now.

Q. What is your birthday; when is it?

A. January 2nd.

Q. And on this day, which was January 5th, 1940, when your uncle gave you the tomato can of gasoline to pour into the carburetor, just tell the jury how you did it, and where you were?

A. Well, I took the can from my uncle and I climbed up on the fender, and I couldn't find—well,

(Testimony of Wilmer Bunney.)

there wasn't no place, so then I got off again, and then I kind of lay stradle of the fender and poured the gas into the carburetor.

Q. You laid straddle of the fender?

A. Yes.

Q. Were either of your feet on the ground when you were laying straddle of the fender, pouring the gasoline?

A. One of them was; it was kind of dangling like.

By Mr. Welts: That's all.

Cross Examination

By Mr. Pearson:

Q. Now, this is a V 8 engine? [20]

A. Yes.

Q. And the carburetor is in the middle, between the two cylinder blocks, is it not?

A. Yes.

Q. That is quite a ways from the edge of the truck, is it not? A. Yes.

Q. It was necessary for you to crawl up on the fender to get over there to pour that gasoline in?

A. Yes.

Q. Now then, do you remember your testimony in the Superior Court?

A. Well, I remember most of it.

Q. You were testifying under oath, were you?

A. Yes.

Q. I will ask you if your testimony there was not this:

(Testimony of Wilmer Bunney.)

"Question: How did you do that?

"Answer: He asked me to pour it in there. The first time I didn't think it was a good idea, me sitting there or standing up there, so I laid down on there and poured it in.

"Question: Laid down on what?

"Answer: On the fender. It was kind of safer and I was kind of afraid of falling, jerking.

"Question: So you laid on the fender and was pouring gasoline into the carburetor of the truck?

"Answer: Yes."

That is true, is it? A. Yes.

Q. Now then, who was sitting at the wheel of the truck at [21] the time?

By the Court: That is not cross examination.

Q. (By Mr. Pearson) Who asked you to go on the truck and pour the gasoline in?

A. My uncle.

Q. Which one? A. David.

Q. At the time he asked you to do that, was he in the 1938 truck, or was he on the ground around the car?

A. Well, he was—he sat there and called me the first time and I didn't pay much attention. The second time——

By the Court: That is not proper cross examination. There is no use going into matters that are not properly before us.

By Mr. Pearson: That's all.

DANIEL BUNNEY

produced and sworn as a witness on behalf of plaintiff, upon oath testified as follows:

Direct Examination

By Mr. Welts:

Q. Would you state your name?

A. Daniel Bunney.

Q. Where do you live, Mr. Bunney?

A. I live at Route 4, Mount Vernon.

Q. How old a man are you?

A. Twenty-three.

Q. Mr. Bunney, just limiting you now to the occurrence on the 5th of January, 1940, when your brother David and you were moving a truck up near the Clarence Bunney and Wilmer Bunney home, where was that truck that was being moved? [22]

A. It was in the street.

Q. And how did you happen to be helping in moving it?

A. Well, David asked me to help him change boxes on the trucks.

Q. Now, after you started to move it, did one wheel bog down in the soft dirt? A. Yes.

Q. What did David Bunney then do to get it out?

A. Well, he hitched the 1938 truck in front of it, and asked Wilmer to pour some gasoline in the carburetor to get it started.

Q. How did he hitch the 1938 truck onto the 1935 truck?

(Testimony of Daniel Bunney.)

A. We put a chain on the back of the 1938 and on to the front of the 1935 truck.

Q. What did he have you do?

A. He had me step on the starter.

Q. Of what truck?

A. Of the 1935 truck.

Q. Where were you sitting to step on the starter?

A. I was sitting in the driver's seat.

Q. Where with reference to the steering wheel?

A. I was right underneath the steering wheel.

Q. All right. Did you see the child hurt?

A. Yes.

Q. By the backfiring of the motor?

A. Yes.

Q. What were you doing, if you know, when the child was hurt?

A. Well, I got out of the truck and started to help catch the boy. He started to run.

Q. Well, that was after he caught on fire, but I mean at the [23] instant the child was injured, when the explosion occurred, what were you doing?

A. I was stepping on the starter.

By Mr. Welts: You may inquire.

Cross Examination

By Mr. Pearson:

Q. I suppose you had the clutch out at that time of stepping on the starter?

A. I don't remember that.

(Testimony of Daniel Bunney.)

Q. Well, you couldn't start the engine with the clutch in, could you?

A. Not unless I had it out of gear.

Q. You had it out of gear?

A. I don't remember that, either.

Q. Well, if you had it in gear and stepped on the starter, the engine wouldn't run, would it?

A. No. The starter would pull the car if I had it in gear.

Q. The starter wouldn't pull the truck if it was in gear?

A. Well, it would pull it if was all clear; it would pull it ahead.

Q. To start the engine, your first act is to push the clutch out and step on the starter?

A. Yes, take it out of gear, yes.

Q. That is what you did there?

A. I believe it was.

By Mr. Pearson: That's all.

Redirect Examination

By Mr. Welts:

Q. At that time, what was your brother David doing with the [24] truck that was hitched onto the 1935 truck?

A. Well, he was in front. He was going to pull it to get it out.

Q. Do you know whether he was pulling with his truck at the time the motor started?

A. No, I don't remember.

By Mr. Welts: That's all.

(Testimony of Daniel Bunney.)

Recross Examination

By Mr. Pearson:

Q. Where was Wilmer Bunney at the time of this accident?

Mr. McBee: Objected to as improper cross examination.

By Mr. Pearson: I think the rules provide only one Counsel——

By the Court: You say where was the boy that was hurt?

By Mr. Pearson: Yes, Your Honor.

By the Court: Objection sustained. It is not proper cross examination.

By Mr. Pearson: That's all. Except to the ruling of the Court.

DAVID BUNNEY

produced and sworn as a witness on behalf of plaintiff, upon oath testified as follows:

Direct Examination

By Mr. Welts:

Q. State your name?

A. David Bunney.

Q. At the time that the child Wilmer Bunney was hurt by the gasoline catching on fire and the truck backfiring——

By Mr. Pearson: Those witnesses will remain in attendance, will they not? [25]

(Testimony of David Bunney.)

By Mr. Welts: I presume something should be said to them.

By Mr. Pearson: I would like to have these witnesses that have testified remain in attendance.

By the Court: Bailiff: You will tell the witnesses to remain in attendance.

Q. (By Mr. Welts) On January 5th, 1940, where were you when the truck backfired and the child caught on fire?

A. Well, I was in the 1938 truck at the time of the accident.

Q. Where was the 1938 truck with reference to the 1935 truck?

A. Hooked on in front.

Q. How did you hook onto it?

A. With a log chain.

Q. For what purpose did you hook onto it?

A. To pull the truck out.

Q. Did you see the child at the instant of the explosion? A. No, I did not.

Q. What were you doing with the 1938 truck when the explosion occurred?

A. Well, I was in there ready to pull the other truck out.

Q. Do you know whether or not you were pulling with the 1938 truck when the explosion occurred?

A. I don't just remember now. It is quite a while ago.

Q. You are the defendant in the suit that I got the judgment against, are you?

(Testimony of David Bunney.)

A. Yes sir.

By Mr. Welts: That's all.

By Mr. Pearson: That's all. [26]

G. A. POUND

produced and sworn as a witness on behalf of plaintiff, upon oath testified as follows:

Direct Examination

By Mr. Welts:

Q. Will you state your name?

A. G. A. Pound.

Q. And you live where?

A. Mount Vernon.

Q. Mr. Pound, in January, 1940, in what business were you engaged?

A. I was in the Ford retail business.

Q. Under what name?

A. Pound Motor Company.

Q. And how long have you been in that business, approximately?

A. A little over two years.

Q. Did you become acquainted with David Bunney? A. I did, yes sir.

Q. When?

A. Well, I had known David Bunney off and on for several months in the latter part of 1939.

Q. Did you have any dealing with David Bunney on behalf of your company the latter part of 1939 and during the first four days of January, 1940?

(Testimony of G. A. Pound.)

A. Yes, I did.

Q. Will you go ahead and tell what that deal was, and what occurred?

A. Well, some time the latter part of December, Mr. Bunney came in, or he was brought into our office to look at a 1938 Ford truck chassis and cab. We negotiated along with him for several days and at last came to an agree- [27] ment with him regarding the sale, or purchase by him of this 1938 Ford chassis.

Q. What equipment did he have, if any, that he wanted you to buy from him in connection with his purchase of the 1938 chassis and cab?

A. Well, when he first came in, or when the deal was first presented to me——

By the Court: (Interrupting) Is it necessary to go into that whole contract of transfer? It seems to me that, under the certificate here, perhaps you are going just a little far afield, opening up a question here that might consume more time.

By Mr. Welts: It would take only a very few moments.

By the Court: It will take more than a very few moments perhaps when Mr. Pearson gets started here.

By Mr. Welts: Well, I thought it was necessary that I show what the deal was in order to show what property Pound was to get, and what was to be done with it?

By the Court: I don't think so, under the certificate here.

(Testimony of G. A. Pound.)

By Mr. Welts: I think that goes to the ownership.

By the Court: I think you can simply state what was done with the deal.

By Mr. Welts: All right. I will put it this way:

Q. As the Court has suggested, Mr. Pound, in making the deal and the sale of the Bunney equipment to you as a part of that consideration of that sale, what did Mr. Bunney agree to do?

A. He agreed to trade in to us a 1935 Ford truck with a wooden body, lined with steel.

Q. And under the agreement, who was to deliver it to you? [28] A. Bunney was.

Q. There was a steel body on that equipment at the time, was there not? A. There was.

Q. What was to become of the steel body?

A. He was to take that off.

Q. And put what on?

A. A wooden body.

Q. And do what else?

A. Well, he was then to deliver it to us.

By the Court: Where was he to deliver it?

Q. (By Mr. Welts) Where?

A. At our place of business in Mount Vernon.

Q. And the steel body wasn't yours at all? Bunney, he was keeping that?

A. He was keeping that.

Q. And state whether or not he was to make the change of these bodies and make delivery to you of the truck before the sale was completed?

By Mr. Pearson: Object to that as a conclusion.

(Testimony of G. A. Pound.)

By the Court: Yes. It is a conclusion of law. When was the truck delivered?

Q. (By Mr. Welts) When did he actually deliver the truck with the wooden body on it?

A. On or about the 20th of January.

Q. Now then, state whether or not that agreement you spoke of with reference to Bunney changing bodies and delivering the vehicle, or agreeing to deliver the vehicle, state whether or not that was made before or at the time that he paid for the new truck? [29]

A. It was made just before, I believe, just the day before.

Q. Now, on that day that he took delivery of the new truck, did he make any request of you to delay his delivery on the 1935 truck?

A. Well, not that day, but a few days after that, he did.

Q. What request did he make?

A. Well, he came down and said he was very busy. He was to deliver the truck on Monday. He was going to change the bodies on a Sunday and he came down Monday or Tuesday and said he had been very busy and couldn't make the change-over, but would make it in a few days and deliver the truck.

Q. Did you agree to that? Did you tell him that was all right? A. Yes sir, I did.

Q. And so, then, he actually delivered at a later date, subsequent to that? A. Yes sir.

Mr. Welts: That's all.

(Testimony of G. A. Pound.)

Cross Examination

By Mr. Pearson:

Q. What date did you deliver the 1938 truck to Bunney?

A. On January 4th—no—yes, January 4th, I believe it was.

Q. And that was the day before the accident?

A. Well, I don't know about the accident at all.

Q. And on that day, did he pay you the difference between the 1935 truck and the 1938 truck?

A. Well, I haven't the records before me, but he possibly did.

By the Court: That is admitted in the exhibits, because the [30] receipts and draft are there.

Q. (By Mr. Pearson) Well, as a matter of fact, it was January 4th that he paid for it?

A. Yes.

Q. And that was January 4th you delivered the 1938 truck? A. Yes.

Q. You went out and inspected the wooden body, did you not, before the deal was finished, before you took in the 1935 truck? A. Yes sir.

Q. Before you agreed to take in the 1935 truck, that is, before January 4th? A. Yes sir.

Q. You went out and looked at the wooden body and saw the 1935 chassis, and decided to take them in on this deal? A. That's right, sir.

Q. The only thing that remained to be done was the transferring of that truck body and put it on the 1935 chassis?

(Testimony of G. A. Pound.)

A. Well, that was part of the consideration of the deal, yes sir.

Q. On the 1938 truck, on January 4th, did Mr. Bunney deliver to you the certificate of title—on the 1934 truck? A. I can't tell you the day.

By the Court: That is admitted in the certificate.

Q. Do you know what the certificate of title is?

A. Yes sir.

Q. What is it?

A. It is a description of the particular truck, motor number and serial number.

Q. Where does it come from? [31]

A. Olympia, Washington.

Q. And the exchange of ownership——

By the Court: (Interrupting) That is all admitted.

By Mr. Pearson: That particular point isn't covered.

By the Court: Oh, yes. It is all admitted. The certificate speaks for itself.

By Mr. Pearson: We haven't got it here.

By the Court: Well, it is admitted that it was issued.

By Mr. Pearson: Very well, then, you got the certificate on the 4th; that is admitted. That's all.

Redirect Examination

By Mr. Welts:

Q. Just one question: You stated, Mr. Pound, that a few days before this deal was—a few days

(Testimony of G. A. Pound.)

before the 1938 truck was taken from the garage by Bunney, you looked at the wooden body that was to be put on the 1935 truck. Where was the wooden body when you looked at it?

A. It was on another truck that was sitting there.

Q. Of the Bunneys'? A. Yes sir.

By Mr. Welts: That's all.

ORVILLE POUND

produced and sworn as a witness on behalf of plaintiff, upon oath testified as follows:

Direct Examination

By Mr. Welts:

Q. Will you state your name?

A. Orville Pound.

Q. And where are you located at the present time? [32] A. Ft. Lewis.

Q. In the early part of January, 1940, where did you live?

A. I lived in Mount Vernon.

Q. And what was your business at that time?

A. I was a salesman working for—I believe at that time I was working for my dad.

Q. Pound Motor Company?

A. Yes sir.

Q. Pound Motor Company was a corporation, was it not? A. Yes sir.

(Testimony of Orville Pound.)

Q. And G. A. Pound, just on the witness stand, is your father? A. Yes sir.

Q. And was manager of that company in the business? A. Yes sir.

Q. And you were the salesman?

A. Yes sir.

Q. Mr. Pound, about January 1st, or a few days before January 1st, 1940, did you, as salesman for the motor company, arrange for a sale to David Bunney of a 1938 truck with cab and chassis only, but no bed, and the acquisition by Pound Motor Company from Bunney of a 1935 truck with certain equipment on it? Did you negotiate such a transaction? A. Yes sir.

Q. And who were your dealings with?

A. Well, they were just with Mr. Bunney.

Q. David Bunney? A. Yes sir.

Q. Did you finally, on behalf of the motor company, come to an agreement as to price and equipment that each would [33] get? A. Yes sir.

Q. Tell me what kind of a body was on the 1935 truck when you were making these deals?

A. There was a steel body.

Q. Under the dealings, when the arrangement was made for the exchange, what was to become of the steel body?

A. Well, the way the deal was worked out, the steel body was supposed to go on the truck he bought from us, the 1938 chassis, and he had a wooden body on another truck and that was sup-

(Testimony of Orville Pound.)

posed to be transferred to the truck we were taking in, the 1935 truck.

Q. At the time you came to terms with this man, prior to January 4th, what agreement did he make with you for the motor company with reference to changing the bodies on the truck and delivering the truck to the motor company?

A. Well, he asked us if he could change the bodies.

Q. Who was to do the job of changing the bodies and bringing the truck down to Pound Motor Company? A. David Bunney.

Q. Did he so agree in the sale that was made?

A. Yes sir.

Q. Now then, when was it with reference to January 1st, say, that you made your sale agreement, your oral arrangements with Bunney?

A. Well, we made an oral agreement, I guess, just a little before we completed the sale.

Q. Finally the purchase order was signed?

A. Yes sir.

Q. And it was in this oral agreement previously that he agreed [34] to change the bodies and deliver the 1935 truck? A. That's right.

Q. When he took the 1938 truck, did it have any body on it? A. No sir.

Q. Now, did he change the bodies and deliver the 1935 truck before January 6th?

A. No; it was some time after that.

(Testimony of Orville Pound.)

Q. And you say you were a salesman and your father was the manager of the company?

A. Yes sir.

Q. I will ask you whether, after you worked out these arrangements, they had to be submitted to your father? A. Yes sir.

Q. Did you so submit them? A. Yes sir.

Q. That is, you told him the deal you had made with Bunney? A. That's right.

Q. And then, did your father approve it, and look at this wooden body that was to go?

A. We drove up and looked at this wooden body and agreed to the change-over.

Q. I take it that was after Bunney had agreed to do the things in connection with the sale?

A. That's right.

Q. Now then, you looked at the wooden body before he took the 1938 truck? A. Yes sir.

By Mr. Welts: I think that's all. [35]

Cross Examination

By Mr. Pearson:

Q. You were satisfied with the wooden body and the 1935 chassis, to take it in on the deal?

A. Yes sir.

Q. All that remained to be done was to transfer the body onto the 1935 chassis, and that was all there was to be done? A. Yes sir.

Q. Handing you Defendant's Exhibits A-1, A-2, and A-3, which is, A-1, automobile purchase order, photostat copies; A-2 is the receipt for $339.00, and

(Testimony of Orville Pound.)

the other is a chattel mortgage on the 1938 Ford truck. I ask if you recognize those? Are those the instruments covering that deal?

By Mr. Welts: We object to those as immaterial and irrelevant, because we don't question but what, on January 4th, Bunney came into ownership of the 1938 cab and chassis and drove it home.

By Mr. Pearson: And took delivery on that date?

By the Court: I think it is all admitted that the truck was taken over.

Q. (By Mr. Pearson): You recognize those?

A. Yes sir.

By Mr. Pearson: We offer them in evidence.

By Mr. Welts: Object to them as irrelevant and immaterial.

By the Court: These are the photostat copies? Oh, they can be admitted.

By Mr. Pearson: I offer the chattel mortgage at this time, too. [36]

By the Court: I assumed they were admitted yesterday.

By Mr. Pearson: That's all.

By Mr. Welts: Just one moment and I can close, Your Honor, I think. In order that the record may be complete, Your Honor, we had a conversation this morning with reference to certain proof I was going to make. I understood Your Honor to rule that, inasmuch as the defendant had stated that he

had no counter proof to offer, that my proof would be taken as established fact. To put that in the record, so there can be no controversy about it, I now offer to prove by the respective witnesses on the matter of notice——

By Mr. Pearson: I think we can shorten this up.

By the Court: The Court has already ruled upon that. It is not necessary for an offer of proof.

By Mr. Welts: The proof will be that contained as an offer in the Court's statement?

By the Court: The Pre-Trial Certificate.

By Mr. Welts: On pages, commencing with Line 25, page 4, through to line 19, page 5, that is the subject matter I offer to prove, and I take it Your Honor's position is that it is unnecessary and it is considered I don't have to prove.

By the Court: They will speak for themselves. He has no contrary proof to offer. Even though Mr. Pearson had not said he had no proof to offer, I would have declined the testimony.

By Mr. Pearson: It is agreed that we were notified February 1st, 1940.

By Mr. Welts: That is what you said, Mr. Pearson, and I don't [37] controvert it. We rest, Your Honor.

By the Court: Have you some further testimony?

By Mr. Pearson: Well, I think so. I have a motion to make. I don't think there is anything in dispute as to the witnesses, or the——

By the Court: (Interrupting) Do I understand that both sides close as to the testimony?

By Mr. Pearson: Yes, Your Honor, we rest. I have a motion to make, of course.

Whereupon the Court admonished the jury, and then recessed until 1:30 o'clock P. M., October 7th, 1942, at which time, Counsel being present, the Court re-convened and the following proceedings were had, to wit:

By the Court: Note all the jurors in the box. Proceed.

By Mr. Pearson: We have a motion to present, if your Honor please. I think the jury might be excused.

By the Court: Oh, they will not consider this motion. I will tell them not to.

By Mr. Pearson: Comes now the defendant, Associated Indemnity Corporation, and challenges the sufficiency of the evidence to sustain any verdict against this defendant, on the grounds of failure of proof, and upon the grounds that the evidence shows, undisputed evidence, that the truck was not covered at the time of the accident, and that the policy did not apply to the accident. If your Honor please, the policy——

By the Court: (Interrupting) Is the motion now complete?

By Mr. Pearson: And moves the Court to take the case from the jury and enter judgment of dismissal at this time. Now, in arguing that motion—— [38]

By the Court: (Interrupting) I will state to

Mr. Pearson that I am quite familiar now with the policy and with all the facts. I think I am prepared to rule on the motion now.

By Mr. Pearson: Before Your Honor does, there is just one point more that I want to call Your Honor's attention to, and that is the automatic insurance paragraph.

By the Court: Well, that is a matter likewise which I have fully considered. I am prepared to rule upon it now. I am simply saying that in view of the fact that the jury is not concerned with this matter here and what I say, and I don't want to say any more than is necessary, and the argument would do no good. I feel I have considered that.

By Mr. Pearson: Your Honor has considered the fact that it states in there that, upon the delivery of the 1938 truck, it terminates automatically on the 1935 truck?

By the Court: Yes. We are not concerned with that insurance now in connection with the automatic effect on the new vehicle. We are only concerned with the old vehicle, and I shall have to instruct the jury that it remains on the old vehicle until the title left the Bunneys, and that would include delivery. That issue of delivery is an issue of fact.

By Mr. Pearson: That paragraph, however, you will notice, says upon the delivery of the 1938 truck.

By the Court: Well, that is a question of fact that the Court will not dispose of. I am simply saying that so as to avoid any prejudice of any sort against your client in what I might say further in the matter. Is there any [39] other motion?

By Mr. Pearson: That is my motion.

By the Court: The motion will be denied and exception will be noted.

By Mr. Pearson: It is understood that a lot of argument was made on this yesterday on the Pre-Trial Conference, so that the record will show we have not abandoned that point?

By the Court: Yes. I examined the authorities submitted, and some others, and I have come to the conclusion. You may proceed with the argument. I just want to make this observation, however, that, in view of what has just transpired, I think that the plaintiff's opening argument should take in a full, fair statement of plaintiff's position, not to make a few short remarks and then make your whole argument after the defendant has made his argument. It is to be a full, fair statement.

Whereupon, Mr. McBee argued for the plaintiff; Mr. Pearson argued for the defendant, and Mr. Welts made the closing argument on behalf of plaintiff. At the close of the argument, a short recess was taken, after which, Counsel and all jurors being present, the following proceedings were had, to wit:

By the Court: This, Gentlemen of the Jury, is a civil action to recover on a policy of insurance issued by the defendant company. The complaint indicates as a basis for the claim of the plaintiff, who is a minor and sues by his guardian. The defendant insurance company denies liability, and sets

forth the reasons in its Answer. Pursuant to the law and Rules of the United States Courts, a pre-[40] trial conference was directed. The lawyers met with the Court and agreed upon many facts in this case. A certificate was filed by the Judge, setting out the findings agreed upon, and likewise noted the open issues to be determined by you as a question of fact.

Upon the certificate of admissions made by the respective parties you are not concerned. Those facts are established. The only issues of fact to be determined by you in this case, as shown by the certificate, are three: The first is the ownership of the truck referred to as the 1935 truck, on the 5th day of January, 1940. That is the date upon which the accident happened. Another open question is the position of the minor plaintiff in this case with relation to the automobile at the time that he was pouring gasoline from his tomato can into the carburetor, whether he was on the car or whether he was partially on the car, or whether he was standing on the ground. And the other is the activity of David and Daniel Bunney at the time of the accident with relation to the attempted movement of the 1935 truck by another truck by having it attached to the forward truck and trying to move it. I instruct you that, so far as these last two open issues are concerned, they are not material in this case, and your attention will be directed to the first open issue, and that is: who was the owner of the 1935 truck on the 5th day of January, 1940, the date of this accident.

The defendant, while admitting the policy, date and issuance of the policy and the endorsements thereon, has, in the evidence, and the answer, claimed that it is not [41] liable by reason of certain exemptions in the policy, which are enumerated, and which have been presented to you, and are outlined in their Answer.

These pleadings, if you desire them, will be sent to the jury room with you, but they are not evidence in any sense, and should not be considered so if they are sent to the jury room. I don't think they will be of much value to you in this case, in view of the certificate of findings and the only open issue left.

The burden of proof in this case is upon the plaintiff to establish all of the allegations of the complaint, to show that the policy was issued and also the rendering of its judgment. The action is predicated not on an open claim of acts of omission or commission or the fault of any one, but it is predicated upon a judgment which has been rendered in favor of the minor against another party, not a party to this suit, for the injury which he sustained, and this is claimed against the insurance company as having indemnified the party against whom the judgment was rendered against any liability thereunder, and if this is sustained, then, of course, the company are going to pay, and that is the real issue.

David and Clarence Bunney were doing business as Bunney Brothers, and pursuant to the laws of

the State of Washington, procured from the Department of Public Service of the State, a Common Carrier Permit, No. 7034, which is in evidence, granting authority, intrastate irregular route and nonradial service, as a carrier engaged in dump truck operations in King, Snohomish and Skagit Counties, and, pursuant to the laws of the State of Wash- [42] ington then in force, procured and filed liability and property damage insurance from the defendant company. David Bunney, doing business as Bunney Brothers, deposited with the Department of Public Service a policy of liability insurance written by the defendant, with various endorsements thereon, by which policy the defendant agreed to pay any final judgment for personal injuries caused by any and all vehicles covered by the terms of the policy, in accordance with the laws of the State, in which policy it was provided that nothing contained in the policy nor in any endorsement thereon, nor any of the provisions therein, shall relieve the company from the payment of such judgment, except such as certain exemptions may provide.

It is provided that liability does not apply to the owner of any hired automobile, or trailer, nor to any employee of any such owner, or when operated by a person under fourteen years of age, and other exemptions.

The plaintiff, having obtained a judgment against others for injury in a court of competent jurisdiction, has a right to maintain this action against the

defendant to recover the amount thereof, unless the right is excluded by some exemptions in the policy.

The claim that the defendant did not give timely notice of the accident to the defendant insurance company is not available as a defense in this case, as a matter of law. From the disclosures made on the pre-trial hearing, the notice was sufficient and timely given, and could not be urged in this suit as against this boy, and no prejudice did result to the defendant company [43] in making its investigation of all witnesses who were familiar with the facts, and all were then available.

One defense states that the injured boy was an employee and is not covered by the policy. Nothing appears in this case to show that the boy was holding anything but a tomato can containing some gasoline, pouring it into the carburetor, nor performing anything but a casual, gratuitous service. To be an employee requires more than one act of gratuitous service. There must be a continuity of acts, either pursuant to an agreement of the minds, or willingly performed on the one side and acceptance on the other, upon which an implied contract might be inferred, and these acts and these conducts must be done by persons who are competent to enter into arrangements or agreements. The boy in this case was thirteen years of age. He was, therefore, incompetent to enter into this employment, or any other employment, without the consent of his guardian, or without the consent of his father and

mother, or one of both of them, and in this case that was not done, so he was not an employee.

Another exemption urged by the defendant is that the boy was riding upon the automobile when he was injured. This exclusion clause appears in the rider under "Passenger Exclusion Clause," which removes from its operations one entering upon, riding in, or alighting from the automobile.

By Mr. Pearson: If Your Honor please, it also appears in the Public Service endorsement.

By the Court: And it may appear in the Public Service endorsement, as stated by Counsel. To make the applica- [44] tion of this exemption, the relations of the boy to the automobile at the time, the business in which Bunney Brothers were then engaged, and what the boy was doing, must be considered with the term "passenger." It may be said that a passenger, in the ordinary sense of the meaning of the term, and its legal sense as well, is one where the traveller rides in a public conveyance used or provided by the carrier for that purpose, and by virtue of an express or implied contract with the carrier for that purpose for the transportation from one place to another, usually for the payment of a fare, or that which is equivalent to a fair consideration. In this case, the testimony shows that the Bunney Brothers were engaged in a dump truck business, not in passenger service. The boy was sitting astride the fender of the automobile, the front fender, pouring gasoline into the carburetor. He had nothing else to do with the car in

any sense, and that did not make him a passenger within the sense of that exemption.

Another exemption urged by the defendant is that it excluded benefits to one injured when the automobile was being operated by one under fourteen years of age. This boy was thirteen years of age, and, it is claimed, was operating the truck, and recovery cannot be had. You are instructed that, within the meaning of this policy, this boy was not operating this truck when he was injured. The truck was not in motion. It was not in a condition where it could be operated. The boy was merely pouring gasoline out of a tomato can into the carburetor, which is the container where the air and gasoline [45] are mixed. The boy did not have control or anything to do with the steering wheel, nor the connecting of the clutch, or disconnecting it, with the power, or anything else save and except as indicated, pouring gasoline from the tomato can into the carburetor, and this exemption, therefore, is not available to the defendant. The operation of the truck was authorized as intrastate irregular route and nonradial service as a carrier engaged in dump truck operations, and they are not engaged in passenger business, nor is there anything to show there was any intent or purpose of carrying the boy on this truck in violation of the permit to operate it, and the fact that the boy may have been sitting astride the fender pouring gasoline does not bring him within the exemption claimed.

You are instructed that, if you find this car, on

the day of the injury of this boy, was delivered to the Pound Agency before the injury, or the title passed to the Pound Agency before the injury, then recovery cannot be had. It is admitted that the transaction was completed before the injury, except as to delivery, but all of the papers had been exchanged and the money paid. The transaction would not be completed, of course, until the delivery was had. If the car was retained by Bunney Brothers for the purpose of taking from it the body to be placed on the new chassis and it was then to be delivered, then the policy would still be in force as to the car and it would be covered by this policy. The owner's certificate, the license certificate, may have been delivered, and the money paid, and still, if delivery of the truck was retained, the ownership would still [46] be in Bunney Brothers so far as this policy is concerned.

You are instructed that, if you find from the evidence in this case that the 1935 Ford truck which was covered by this insurance policy was sold and the title thereto transferred to Pound Motor Company on the 4th day of January, 1940, the day before the accident occurred, then you are charged that the insurance policy no longer applied to the 1935 Ford truck, and a verdict in favor of the defendant must be returned.

You are instructed that, in determining whether the ownership of the 1935 truck was in Bunney Brothers on January 5th, 1940, or whether it had passed to Pound Motor Company, the law then in

force in the State of Washington, among other things, provided that, where there is a contract to sell specific articles, the property in them is transferred to the buyer at such time as the parties to it intended it to be transferred. For the purpose of ascertaining the intention of the parties, regard may be had to the terms of the contract, the conduct of the parties, uses of the trade, and circumstances of the case. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer: Where there is a contract to sell specific goods and the seller is bound to do something to the goods for the purpose of putting the goods in a deliverable state, the property does not pass until such things are done. If the contract requires that the seller do certain things to deliver the goods to the buyer, to pay the freight, or to deliver to a [47] particular place, the property does not pass until the goods are delivered to the buyer, or have reached the place agreed upon.

If you find from a fair preponderance of the evidence that, on January 5th, 1940, that under an oral agreement made between David Bunney, acting for Bunney Brothers, and Pound Motor Company, Bunney Brothers agreed to sell and Pound Motor Company agreed to buy this 1935 truck, and the parties agreed that it was the intention of the parties by such agreement that the actual ownership of this truck was to remain in Bunney Broth-

ers until the body thereon had been exchanged and the truck was delivered to the place of business of the Pound Motor Company by Bunney Brothers, and that this had not been done at the time of the alleged injury to the child on January 5th, then you are instructed that Bunney Brothers were on that day the owners of the truck so far as this policy of insurance is concerned, and the defendant's policy of insurance covered the case and protected other parties for bodily injuries arising out of ownership or use of the truck by Bunney Brothers, according to the provisions of said policy and the endorsements or riders thereon considered as a whole.

You are instructed that, if you find by a fair preponderance of the evidence that at the time here in question Bunney Brothers were the owners of the truck, then the provisions of the policy of insurance and the endorsements or riders thereon, issued by the defendant Associated Indemnity Corporation applied to the operation of the truck. [48]

You are not concerned in this case with the automatic effect of the policy on the 1938 car. We are not concerned with that. We are only concerned with whether the policy covered this 1935 car, and if the car was not delivered pursuant to the arrangement between Bunney Brothers, under their contract with Pound Motor Company, that it was to be delivered, or that possession was to be retained until the bodies were changed and then delivered, then the title remained, so far as this in-

surance is concerned, in Bunney Brothers, and was in Bunney Brothers on the 5th day of January, 1940.

You will consider this case fairly, from a fair preponderance of the evidence. You are the sole judges of the facts, and the sole judges of the credibility of the witnesses who have testified in the case. There have only been a few witnesses here this morning, but you will consider this case fairly, and consider in good conscience as you believe the facts are, and if you are convinced by a fair preponderance of the evidence that this ownership or possession was in Bunney Brothers on the date of the accident, and that they were not to deliver it until after the bodies had been interchanged, then you will return a verdict in favor of the plaintiff.

By a fair preponderance of the evidence does not mean the greatest number of witnesses who testified to a fact in this case. You will have to determine from the reasonableness of the testimony what the facts are, and it will require your entire number to agree upon a verdict. When you have agreed upon the verdict, you will cause your foreman to sign it, whom you will elect upon [49] retiring to the jury room. The form of verdict has been agreed upon. Two forms have been submitted.

If you are not satisfied by a fair preponderance of the evidence that the ownership of this truck was in Bunney Brothers on the date of the accident, then your verdict will be for the defendant, which reads: "We, the jury in the above entitled cause, find for the defendant."

If you are convinced by a fair preponderance of the evidence that they were the owners of the truck on that day, and that the policy was in effect, then your verdict will be for the plaintiff, and fix the amount $4258.65. That was the amount which the attorneys computed, so as to save you the time of computing the mathematics.

This is the first case that has been submitted to you, at any rate by me, and I doubt whether all of you have worked together. When you get to the jury room, you may have a number of different viewpoints. That is the benefit of the jury system. There are twelve different minds, and unless they see the thing the same way, why they approach it from twelve different viewpoints, and what you want to do is to reason and talk with each other to determine what the true facts are and conclude, and not to arbitrarily hold out on any view which is not justified by any reason. You are not to be controlled by the majority, but the greater weight of opinion is entitled to some consideration. I mention that because we are just starting into the work.

I believe I have covered the case. Are there any instructions requested otherwise? [50]

By Mr. Pearson: We have some exceptions.

By the Court: Do you want them in the absence or presence of the jury?

By Mr. Pearson: I think in the absence of the jury, to save time.

By the Court: The jury may retire with the Bailiff. I may call you back, however. I don't know.

By Mr. Pearson: Comes now the defendant and excepts to the instructions of the Court as follows: Except to the instructions of the Court, and the various instructions given—I cannot name the specific ones because I haven't any specific copy before me—I will do the best I can with the notes I made.

By the Court: All right.

By Mr. Pearson: Excepts to the instruction where it says that the jury is limited to the 1935 truck as decisive of this action, completely eliminating the theory of the case of the defendant that the automatic exclusion in the policy operated to terminate the coverage on the 1935 truck the moment delivery was accepted of the 1938 truck. The Court not only failed to submit that to the jury, but instructed them on that automatic insurance provision that the only question there was the ownership of the 1935 truck, which completely misses the point.

By the Court: Exception noted. I think the instruction was right.

By Mr. Pearson: And excepts to the instructions of the Court removing from the consideration of the jury the matter of whether or not this boy was riding in or upon the truck at the time, and labelling it passenger traffic [51] exclusion, as a matter of fact, not calling attention to the jury that the Department of Public Service endorsement has it in there and does not call it passenger traffc exclusion, but has in there that coverage shall not apply to any claim for bodily injury or death. That should have been given to clear that up.

By the Court: Note an exception.

By Mr. Pearson: Also excepts to the instruction of the Court removing from the jury the delayed notice given to the defendant in this case. While there was no evidence from the defendant that they were prejudiced, yet delayed notice would indicate they considered they had no coverage, and it should have gone in, at least for that purpose.

By the Court: Note an exception. I am satisfied with the instruction.

By Mr. Pearson: Also excepts to the instruction of the Court that this boy was not an employee, and the instruction of the Court that he could not make a contract as a matter of law. The boy can make a contract, but it is voidable only, not void, and that is excepted to by the defendant because we believe that he was an employee at the time.

By the Court: Note an exception. There was nothing to indicate he was an employee under the general rule.

By Mr. Pearson: Excepts to the instruction by Your Honor that the Bunney Brothers were not in the passenger carrying service, as indicating that would have some bearing upon the matter, when it would not have in this particular case, because, obviously, a truck driver or operator can [52] carry passengers and not be in the passenger carrying service, and the instruction in that way is prejudicial to the defendant.

By the Court: Note an exception.

By Mr. Pearson: And also excepts to Your

Honor instructing the jury that the boy sitting on the fender did not make him a passenger because of the fact that the car was not moving. The law is that a car need not be moving to have some one riding in it.

By the Court: Note an exception. This was not such a case.

By Mr. Pearson: Excepts also the Court instructing the jury that the boy was not operating the truck because it was not in motion, and the statement that the boy had nothing to do with the operation, when as a matter of fact the defendant believes that he was assisting in the operation of the truck, and the jury should have been instructed that way.

By the Court: Note an exception.

By Mr. Pearson: And also excepts to the instruction of the Court that this boy was not a servant operating or repairing, or engaged in operating, repairing or maintenance of the truck, when we believe he would come under that heading.

By the Court: Note an exception.

By Mr. Pearson: Excepts to the instruction of the Court that, if title passed, there was no coverage, but that the 1935 truck would still be covered until the delivery to the Pound Motor Company, when that is not the gist of the matter. The gist of the matter is that the title has nothing to do with the 1935 truck, but upon the de- [53] livery of the 1938 truck, the policy passed from the 1935 truck, and the 1935 truck would not be covered, and there

was a change of interest under the policy which excluded that coverage. That was not covered.

By the Court: Note an exception.

By Mr. Pearson: Excepts to the instruction of the Court which applies to undeliverable condition, because that would not apply in this case, because Pound went out there, saw the body, was satisfied with it, saw the chassis, and was satisfied with it, and nothing left to do but put the two together and take them in. I don't believe it is applicable to say they were not in deliverable condition, because they could have been delivered in that condition.

By the Court: Note an exception.

By Mr. Pearson: Excepts to the instruction of the Court also that, as long as the title to the 1935 truck remained in Bunney Brothers, they would be covered, when, under the policy and its various riders and exclusions, that would not be the fact in a number of instances.

By the Court: Note an exception.

By Mr. Pearson: Now, I have some requested instructions the Court failed to give. Excepts to the failure of the Court to give the requested instruction to find for the defendant, because the defendant believes that, under the law and the evidence, that should have been done.

By the Court: That was denied. Note the exception.

By Mr. Pearson: Excepts also to the failure of the Court to give the requested instruction as follows:

"You are instructed that the mere fact that [54] David Bunney desired to transfer the body from the 1935 Ford Truck is no indication, and is not to be taken by you that he had any title in or to said truck on and after the 4th day of January, 1940, if you find that he sold and delivered title of said truck to other parties on January 4th, 1940."

The failure to give that, I think, was prejudicial to the defendant.

By the Court: Note an exception.

By Mr. Pearson: Except to the failure of the Court to give our requested instruction reading as follows:

"If you find that Wilmer Bunney was an employee working for either David Bunney or Clarence Bunney at the time he was working on said truck then I charge you that your verdict in this case must be for the defendant."

By the Court: Note an exception.

By Mr. Pearson: Except also to the failure of the Court to give our requested instruction that:

"If you find from the evidence that Wilmer Bunney was entering upon, riding in or upon, said automobile at the time of said accident that he would not be covered under the policy and your verdict must be for the defendant. In this respect you are instructed that the word "riding" does not necessarily mean that the truck would have to be in motion, the fact that he was in or on said truck would be sufficient to come within the meaning of the word riding."

By the Court: Denied. Note an exception. I think I covered [55] it.

By Mr. Pearson: Excepts to the failure of the Court to give the following requested instruction:

"You are instructed that if you find from the evidence in this case that the 1935 truck was transferred to the Pound Motor Company on January 4th, 1940, and that on said date said Bunney Brothers, or either of them, purchased a 1938 Ford Truck trading said 1935 Ford Truck to said Pound Motor Company as a part of the purchase price and paying the balance due on said 1938 Ford Truck in cash and that on said date, to wit, January 4th, 1940, said Bunney Brothers, or either of them, took delivery and actual physical possession of the new 1938 Ford Truck then I charge you that said insurance written by defendant on said 1935 truck automatically terminated upon said 1935 truck and automatically covered the 1938 Ford Truck and that the policy did not cover the said 1935 Ford Truck after January 4th, 1940, and if you find that the accident occurred on January 5th, 1940, then I charge you there would be no recovery in this case and your verdict must be for the defendant."

Failure to give that was certainly a body blow to the defendant, because that was one of the main points we relied upon, was the coverage on the 1935 truck automatically changing upon delivery of the 1938 truck.

By the Court: Note an exception. I think I covered that.

By Mr. Pearson: And finally, excepts to the failure of the Court to give the requested instruction as follows: [56]

"You are instructed that the policy did not apply to any vehicle while being operated by any person under the age of fourteen years and if you find that said Wilmer Bunney was under the age of fourteen years and was assisting in the operation of said truck at the time of the accident then I charge you that said insurance policy did not apply at the time of said accident and your verdict must be for the defendant."

By the Court: Note an exception. [57]

State of Washington,
County of Whatcom—ss.

I, Charles Rand, Do Hereby Certify that I am one of the Official Court Reporters of the Superior Court of the State of Washington, for Whatcom County; that I reported in shorthand the trial of Cause No. 16, Civil, entitled Laurence P. Bunney as Guardian of Wilmer Bunney, a Minor, Plaintiff, vs. Associated Indemnity Corporation, Defendant, in the United States District Court for the Western District of Washington, Northern Division, at Bellingham, Washington, on the 7th day of October, 1942; that the above and foregoing Bill of Exceptions is a full*e,* true and correct transcript of all of said shorthand notes so taken.

CHARLES RAND

[Endorsed]: Filed Dec. 12, 1942.

[Endorsed]: No. 10349. United States Circuit Court of Appeals for the Ninth Circuit. Associated Indemnity Corporation, a corporation, Appellant, vs. Laurence P. Bunney, as Guardian of Wilmer Bunney, a minor, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed January 16, 1943.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
For the Ninth Circuit

No. 10349

LAWRENCE P. BUNNEY as guardian of WILMER BUNNEY, a minor,

Appellee,

vs.

ASSOCIATED INDEMNITY CORPORATION, a corporation,

Appellant.

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF PORTION OF TRANSCRIPT OF RECORD TO BE PRINTED

Comes now Associated Indemnity Corporation, Appellant herein and formally adopts the Statement of Points filed by Appellant in the District Court as the points upon which Appellant intends to rely in his appeal to the above entitled Court.

Appellant herein designates and requests that the entire record on Appeal be printed, by which Appellant means the Transcript of Testimony as well as the Transcript of Record. Said Court Reporter's Transcript of Testimony in its entirety which includes all the proceedings in the District Court, including the Court's Instructions and exceptions thereto and exceptions to the refusal to give instructions. Said Court Reporter's Transcript of

Testimony is labelled "Bill of Exceptions". The intention of this designation is that everything sent up by the District Court Clerk as the Transcript of Record be printed save and except the formal parts, such as headings, and like parts which are not printed.

N. A. PEARSON
Attorney for Associated Indemnity Corporation, Appellant herein.
413 Arctic Bldg.,
Seattle, Wash.

Service accepted and copy received this 11 day of January, 1943.

WELTS & WELTS
HENDERSON & McBEE
Attorneys for Appellee.

[Endorsed]: Filed Jan. 21, 1943. Paul P. O'Brien, Clerk.